

# Conversation Contents

## Revised Draft Memo

### Attachments:

/45. Revised Draft Memo/1.1 Draft write up on AA 4.12.18.docx  
/45. Revised Draft Memo/2.1 Draft FOIA Memp 4.15.18.docx

**"Howarth, Robert" <robert\_howarth@ios.doi.gov>**

---

**From:** "Howarth, Robert" <robert\_howarth@ios.doi.gov>  
**Sent:** Sun Apr 15 2018 15:23:40 GMT-0600 (MDT)  
**To:** Juliette Lillie <juliette\_lillie@ios.doi.gov>  
**CC:** Cindy Cafaro <cindy\_cafaro@ios.doi.gov>  
**Subject:** Revised Draft Memo  
**Attachments:** Draft write up on AA 4.12.18.docx

Hi Julie. Sorry for the delay.. (b) (6)

Let's chat in the AM. Next, I will review the doc on Google drive.

Rob

--

Robert Howarth  
Deputy Director for Correspondence and FOIA Management  
Office of the Executive Secretariat and Regulatory Affairs  
Department of the Interior  
1849 C Street, NW  
Washington, DC 20240  
202-208-3181  
202-208-4451 (direct)  
202-549-8961 (cell)

**"Lillie, Juliette" <juliette\_lillie@ios.doi.gov>**

---

**From:** "Lillie, Juliette" <juliette\_lillie@ios.doi.gov>  
**Sent:** Sun Apr 15 2018 16:57:36 GMT-0600 (MDT)  
**To:** "Howarth, Robert" <robert\_howarth@ios.doi.gov>  
**CC:** Cindy Cafaro <cindy\_cafaro@ios.doi.gov>  
**Subject:** Re: Revised Draft Memo  
**Attachments:** Draft FOIA Memp 4.15.18.docx

Rob and Cindy: Attached are my edits. We can discuss in the morning.  
Julie

Juliette Lillie  
Director Executive Secretariat and Regulatory Affairs  
Department of the Interior  
1849 C St. NW  
Washington DC 20240

Email: [juliette\\_lillie@ios.doi.gov](mailto:juliette_lillie@ios.doi.gov)  
Ph: 202-219-7724

On Sun, Apr 15, 2018 at 5:23 PM, Howarth, Robert <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)> wrote:

Hi Julie. Sorry for the delay.. (b) (6)

Let's chat in the AM. Next, I will review the doc on Google drive.

Rob

--

Robert Howarth  
Deputy Director for Correspondence and FOIA Management  
Office of the Executive Secretariat and Regulatory Affairs  
Department of the Interior  
1849 C Street, NW  
Washington, DC 20240  
202-208-3181  
202-208-4451 (direct)  
202-549-8961 (cell)

Memorandum

To: Assistant Secretaries  
Heads of Bureaus and Offices ~~Bureau Directors~~

From: David L. Bernhardt  
Deputy Secretary

1) Subject: Awareness Process for Freedom of Information Act ~~Productions~~ ~~Reviews~~

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2) ~~the unprecedented - and the~~  
~~increased number~~ amount of incoming FOIA requests, and increased litigation the Department  
has ~~faced~~ received the past year ~~in recent years~~, we are now formalizing the awareness process ~~is~~  
~~hereby formalized, as follows, as follows,~~ to ensure it is consistent and effective:

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<sup>2</sup> See 383 DM 15 § 15.6.L.

<sup>3</sup> See 383 DM 15 § 15.6.H.

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Option 1:

FOIA personnel search the responsive emails for the names of current PAS and Schedule C employees. If the names of current PAS and/or Schedule C employees are identified, FOIA personnel notifies and provides access to the full set of responsive records-emails (in the same format and with the same withholdings that have been approved by SOL) and

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<sup>4</sup> See 43 C.F.R. § 2.23(c) (requiring bureaus to consult with SOL before withholding a record in full or in part).

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If you need assistance with a particular awareness review, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts>. If you have general FOIA questions, please contact Ms. Cindy Cafaro at (202)-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

cc: Timothy Murphy, Acting Deputy Solicitor, Division of General Law, Office of the Solicitor  
Bureau/Office FOIA Officers  
FOIA Contacts

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Memorandum

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Deputy Secretary

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§ 15.6 L.  
3 See 383 DM 15 § 15.6 H.

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|

|  Timothy Murphy, Acting Deputy Solicitor, Division of General Law, Office of the  
Solicitor  
Bureau/Office FOIA Officers  
FOIA Contacts

DRAFT

# Conversation Contents

FOIA Strategy Check in follow up

**Attachments:**

/46. FOIA Strategy Check in follow up/1.1 White paper for Dep Sec 4.12.16.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Apr 13 2018 08:19:14 GMT-0600 (MDT)  
Elena Gonzalez <maria\_gonzalez@ios.doi.gov>, Robert Howarth <robert\_howarth@ios.doi.gov>, "Alspach, David" <david\_alspach@ios.doi.gov>, "Burns, Sylvia" <sylvia\_burns@ios.doi.gov>, "Cardinale, Richard" <richard\_cardinale@ios.doi.gov>, Juliette Lillie <juliette\_lillie@ios.doi.gov>, Timothy Murphy <timothy.murphy@sol.doi.gov>, Edward Keable <edward\_keable@ios.doi.gov>, Rachel Spector <rachel.spector@sol.doi.gov>  
**To:**  
**Subject:** FOIA Strategy Check in follow up  
**Attachments:** White paper for Dep Sec 4.12.16.docx

Hello. I'm sharing this draft document per a discussion after today's meeting (an earlier version of this document was shared at Wed.'s meeting).

Thank you, everyone.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## DRAFT

## Strategy for DOI FOIA Program

Thank you for the opportunity to suggest big-picture improvements to improve the Department's FOIA program, a subject that has particular urgency due to DOI's increased FOIA workload. This document highlights a plan for improving various parts of the FOIA process over the next 24 months.

| <b>In<br/>FY17</b> | Full-time<br>FOIA<br>Employees | Equivalent<br>Full-time<br>FOIA<br>Employees | Requests<br>Received | Requests<br>Processed | Requests<br>Received<br>Per FOIA<br>employee<br>(average) | Requests<br>Processed per<br>FOIA<br>Employee<br>(average) | Backlogged<br>Requests as<br>of End of<br>Fiscal Year | Backlogged<br>Requests per<br>FOIA<br>Employee<br>(average) | Average Number<br>of Days to<br>Respond to<br>Complex Pending<br>Requests |
|--------------------|--------------------------------|--|----------------------|-----------------------|---|--|---|---|---|
| BIA                | 5                              | 26.43  | 1854                 | 1773                  | 60  | 57   | 177   | 6   | 130   |
| BLM                | 18                             | 4.5  | 1024                 | 750                   | 45  | 33   | 368   | 16  | 163   |
| BOEM               | 1                              | 5.8  | 170                  | 165                   | 24  | 24   | 15  | 2   | 142   |
| BOR                | 1                              | 6.15   | 315                  | 297                   | 45  | 42   | 17  | 2   | 107   |
| BSEE               | 4                              | 3.1  | 228                  | 233                   | 33  | 33   | 17  | 2   | 158   |
| FWS                | 9                              | 20.95  | 1146                 | 1000                  | 38  | 33   | 265   | 9   | 116   |
| NPS                | 3                              | 5.35   | 1226                 | 1076                  | 153   | 135  | 253   | 32  | 117   |
| OIG                | 3                              | 0  | 218                  | 207                   | 73  | 69   | 20  | 7   | 83  |
| OS                 | 7                              | .5   | 1226                 | 713                   | 163   | 95   | 377   | 50  | 62  |
| OSMRE              | 1                              | 1.73   | 143                  | 95                    | 48  | 32   | 56  | 19  | 159   |
| SOL                | 2                              | -  | 250                  | 207                   | 125   | 104  | 43  | 22  | 127   |
| USGS               | 5                              | .5   | 205                  | 217                   | 34  | 36   | 18  | 3   | 145   |
| DOI<br>Overall     | 63                             | 75.51  | 8005                 | 6733                  | 70  | 58   | 1626  | 12  | 117   |

- **Staffing**

Background:

Intra agency, predecisional, and deliberative—DRAFT

In FY 2017, the Department received 8,005 requests and had 63 full-time FOIA employees throughout the entire Department and a total of 75.51 equivalent full-time FOIA employees (roughly 58 requests per employee). The Department processed 6,733 requests in FY17 (roughly 49 requests per employee).<sup>1</sup>

Broken down roughly, by bureau, in FY17 (keeping in mind some bureaus get more complicated requests that require more searching, variety, or awareness, so this is not apples to apples):

- BIA received 60 requests per employee and processed 57 requests per employee
- BLM received 45 requests per employee and processed 33 requests per employee
- BOEM received 24 requests per employee and processed 24 requests per employee
- BOR received 45 requests per employee and processed 42 requests per employee
- BSEE received 33 requests per employee and processed 33 requests per employee
- FWS received 38 requests per employee and processed 33 requests per employee
- NPS received 153 requests per employee and processed 135 requests per employee
- OIG received 73 requests per employee and processed 69 requests per employee
- OS received 163 requests per employee and processed 95 requests per employee<sup>2</sup>
- OSM received 48 requests per employee and processed 32 requests per employee
- SOL received 125 requests per employee and processed 104 requests per employee
- USGS received 34 requests per employee and processed 36 requests per employee

Although making direct comparisons is difficult, in FY17:

- The Department of Agriculture (also decentralized and dealing with similar obligations, particularly the Forest Service) received 25,461 requests and had 90.8 full-time FOIA employees throughout the Department and a total of 91.26 equivalent full-time FOIA employees (roughly 140 requests per employee). The Department of Agriculture processed 24,006 requests in FY17 (roughly 132 requests per employee).
- The Army (which is a subpart of DOD and houses the Army Corps of Engineers, which deals with similar obligations) in FY 2017 received 26,666 requests and had 121 full-time FOIA employees and a total of 111.82 equivalent full-time FOIA employees (roughly 114 requests per employee). The Army processed 53,760 requests in FY17 (roughly 230 requests per employee).
- EPA (which is also decentralized and deals with similar obligations) received 11,518 requests and had 105 full-time FOIA employee and a total of 10.93 equivalent full-time FOIA employees (roughly 99 requests per employee). EPA processed 10,802 requests in FY17 (roughly 93 requests per employee).

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<sup>1</sup> Consultations and litigation

<sup>2</sup> In FY18, OS has been receiving around 150 requests per month, which could lead to 240 requests being received per employee this fiscal year.



Intra agency, predecisional, and deliberative—DRAFT

- NOAA (which is a subpart of DOC also deals with similar obligations) received 475 requests and had 1 full-time FOIA employee and a total of 23.3 equivalent full-time FOIA employees (roughly 20 requests per employee). NOAA processed 472 requests in FY17 (roughly 20 requests per employee)

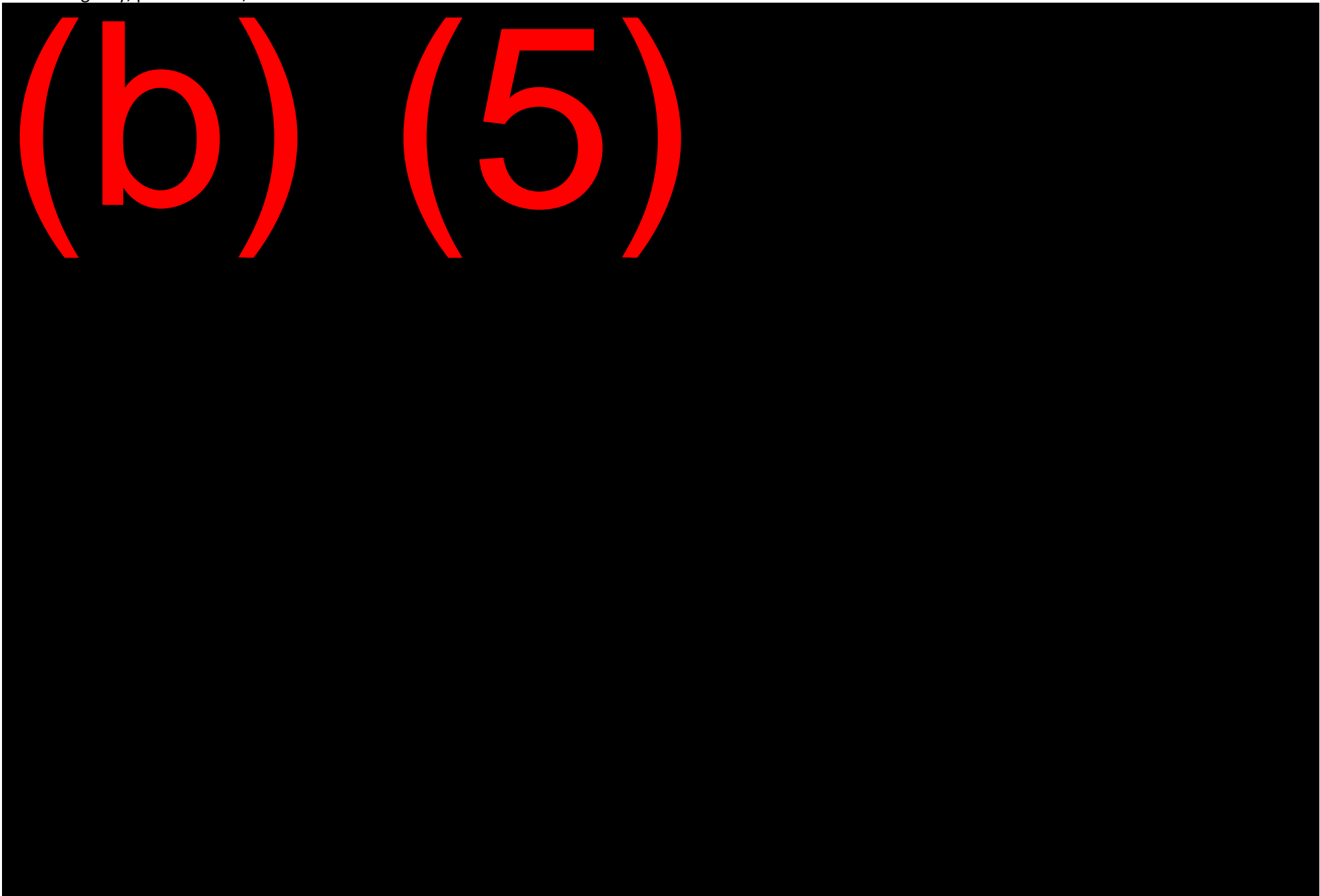
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|   |  |
|---|--|
| Department of State                         | Assistant Secretary of Administration, Bureau of Administration                                      |
| Department of the Treasury                  | not explicitly stated, seems to be Assistant Secretary, Office of Privacy, Transparency, and Records |
| Department of Defense                       | Chief Management Officer   |
| Department of Justice                       | Acting Associate Attorney General  |
| Department of the Interior                  | CIO  |
| Department of Agriculture                   | not explicitly stated, seems to be CIO   |
| Department of Commerce                      | Title not included, Office of the Secretary, Office of Privacy and Open Government                   |
| Department of Labor                         | Solicitor of Labor   |
| Department of Health and Human Services     | Assistant Secretary for Public Affairs   |
| Department of Housing and Urban Development | Director, Office of the Executive Secretariat  |
| Department of Transportation                | Deputy General Counsel   |
| Department of Energy                        | Director, Office of Management   |
| Department of Education                     | Assistant Secretary for Management, Office of Management   |
| Department of Veterans Affairs              | Executive in Charge of the Department of Veterans Affairs' Office of Information and Technology      |
| Department of Homeland Security             | Chief Freedom of Information Act Officer is apparently only title                                    |

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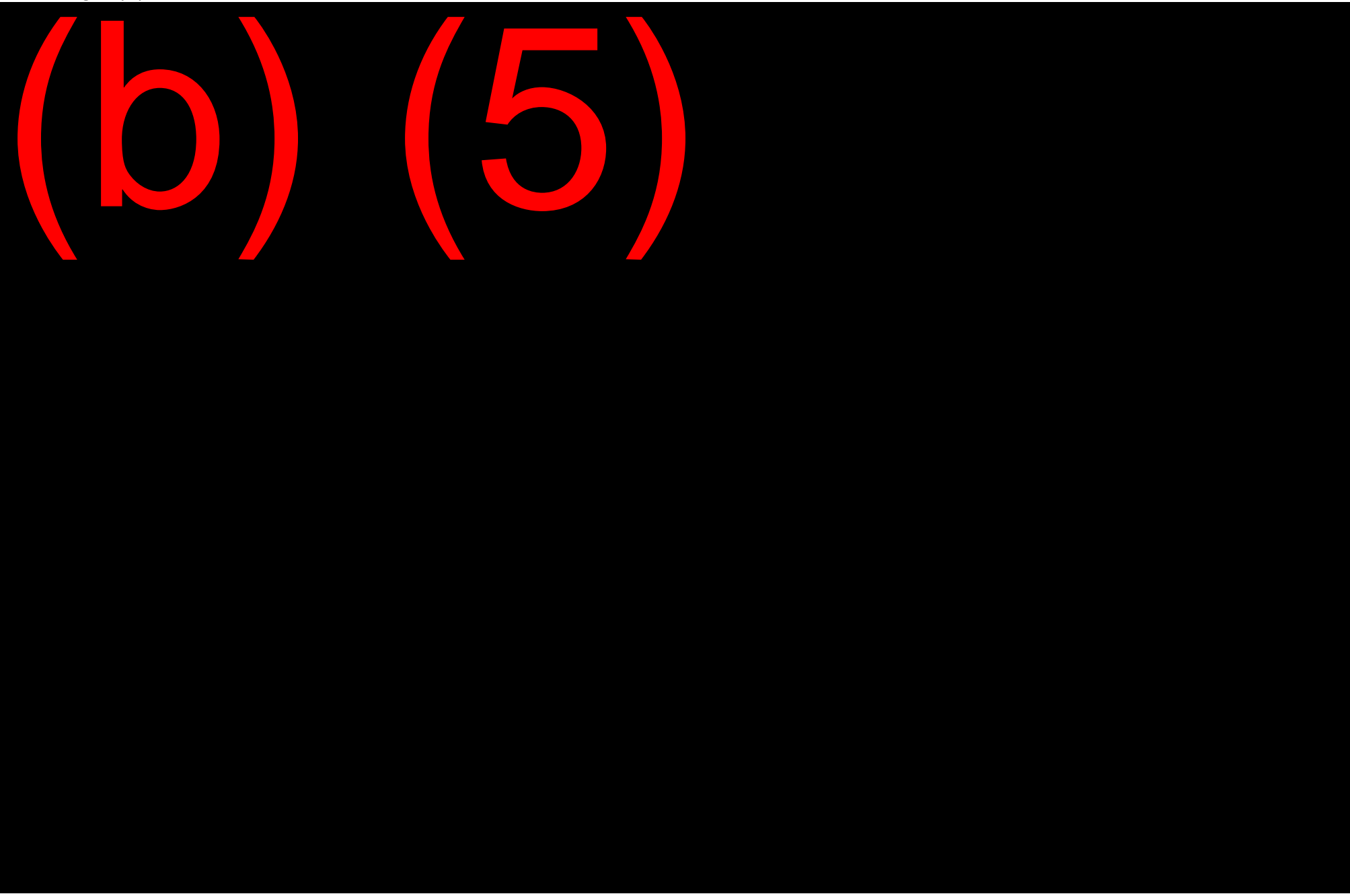
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# Conversation Contents

augmented awareness response

**"Julka, Clarice" <clarice\_julka@ios.doi.gov>**

---

**From:** "Julka, Clarice" <clarice\_julka@ios.doi.gov>  
**Sent:** Thu Apr 05 2018 10:06:05 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>, Cindy Cafaro <cindy\_cafaro@ios.doi.gov>  
**Subject:** augmented awareness response

What response is needed for us to release documents? For example, several people responded by saying "Thanks for sharing" or just Thank you. Is that enough? Can I presume that we can release the records? Do I need to wait for all the people on the email chain to respond a certain way?

Right now, I'm holding up releases because I'm not sure what response I need to have before I can release.

Should I continue to wait on these releases or should I go ahead?

Clarice  
Clarice Julka  
Department of the Interior  
Office of the Secretary, FOIA Office  
1849 C Street, NW, MS-7328  
Washington, D.C. 20240  
[Clarice\\_Julka@ios.doi.gov](mailto:Clarice_Julka@ios.doi.gov)  
(202) 513-0765 - phone  
(202) 208-6045 - direct line  
(202) 219-2374 - fax

# Conversation Contents

contracts: awareness review

**"Julka, Clarice" <clarice\_julka@ios.doi.gov>**

---

**From:** "Julka, Clarice" <clarice\_julka@ios.doi.gov>  
**Sent:** Thu Apr 05 2018 09:50:49 GMT-0600 (MDT)  
**To:** Cindy Cafaro <cindy\_cafaro@ios.doi.gov>, Robert Howarth <robert\_howarth@ios.doi.gov>  
**Subject:** contracts: awareness review

Scott Cameron said he wants to review all documents that fall under his purview before they are released pursuant to his meeting with Dep Sec.

We are currently in the final submitter portion for two contracts. I will at the same time send the records and proposed letters to Scott Cameron.

I'm unclear whether Downey and Laura also need to be involved on everything as well. Please let me know if I also need to send these to them for their review.

Clarice

Clarice Julka  
Department of the Interior  
Office of the Secretary, FOIA Office  
1849 C Street, NW, MS-7328  
Washington, D.C. 20240  
[Clarice\\_Julka@ios.doi.gov](mailto:Clarice_Julka@ios.doi.gov)  
(202) 513-0765 - phone  
(202) 208-6045 - direct line  
(202) 219-2374 - fax



# Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

## Attachments:

/51. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/51. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

## Oladele Awoniyi <oawoniyi@osmre.gov>

**From:** Oladele Awoniyi <oawoniyi@osmre.gov>  
**Sent:** Tue Apr 03 2018 08:21:00 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Oladele Awoniyi has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [oawoniyi@osmre.gov](mailto:oawoniyi@osmre.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [oawoniyi@osmre.gov](mailto:oawoniyi@osmre.gov)  
**Subject:** Further Augmented Awareness Discussion

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Join: (b) (5)  
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**From:** [oawoniyi@osmre.gov](mailto:oawoniyi@osmre.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [oawoniyi@osmre.gov](mailto:oawoniyi@osmre.gov)  
**Subject:** Further Augmented Awareness Discussion

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# Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

## Attachments:

/52. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/52. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

**Jessica Rogers <jessica.rogers@bia.gov>**

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**From:** Jessica Rogers <jessica.rogers@bia.gov>  
**Sent:** Mon Apr 02 2018 07:49:15 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Jessica Rogers has accepted this invitation.

## Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [jessica.rogers@bia.gov](mailto:jessica.rogers@bia.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [jessica.rogers@bia.gov](mailto:jessica.rogers@bia.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone: (b) (5) passcode:  
(b) (5) /span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [jessica.rogers@bia.gov](mailto:jessica.rogers@bia.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [jessica.rogers@bia.gov](mailto:jessica.rogers@bia.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----



# Conversation Contents

**Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

## Attachments:

/53. Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics

/53. Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

## Charis Wilson <charis\_wilson@nps.gov>

**From:** Charis Wilson <charis\_wilson@nps.gov>  
**Sent:** Thu Mar 29 2018 09:53:16 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Charis Wilson has declined this invitation.

### Further Augmented Awareness Discussion

To join the session by phone (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [charis\\_wilson@nps.gov](mailto:charis_wilson@nps.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [charis\\_wilson@nps.gov](mailto:charis_wilson@nps.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [charis\\_wilson@nps.gov](mailto:charis_wilson@nps.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [charis\\_wilson@nps.gov](mailto:charis_wilson@nps.gov)  
**Subject:** Further Augmented Awareness Discussion

---

To join the session by phone (b) (5) passcode:  
(b) (5) /span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

# Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

## Attachments:

/54. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/54. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

## Carrie Hyde-Michaels <carrie\_hyde-michaels@fws.gov>

**From:** Carrie Hyde-Michaels <carrie\_hyde-michaels@fws.gov>  
**Sent:** Mon Mar 26 2018 08:40:04 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Carrie Hyde-Michaels has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [carrie\\_hyde-michaels@fws.gov](mailto:carrie_hyde-michaels@fws.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [carrie\\_hyde-michaels@fws.gov](mailto:carrie_hyde-michaels@fws.gov)  
**Subject:** Further Augmented Awareness Discussion

---

To join the session by phone (b) (5) passcode:  
(b) (5) /span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [carrie\\_hyde-michaels@fws.gov](mailto:carrie_hyde-michaels@fws.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [carrie\\_hyde-michaels@fws.gov](mailto:carrie_hyde-michaels@fws.gov)  
**Subject:** Further Augmented Awareness Discussion

---

To join the session by phone (b) (5) passcode:

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----



# Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

## Attachments:

/55. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/55. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

**Stefanie Jewett <stefanie\_jewett@doioig.gov>**

---

**From:** Stefanie Jewett <stefanie\_jewett@doioig.gov>  
**Sent:** Mon Mar 26 2018 07:06:58 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Stefanie Jewett has accepted this invitation.

## Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- r Witt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [stefanie\\_jewett@doioig.gov](mailto:stefanie_jewett@doioig.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [stefanie\\_jewett@doioig.gov](mailto:stefanie_jewett@doioig.gov)  
**Subject:** Further Augmented Awareness Discussion

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<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [stefanie\\_jewett@doioig.gov](mailto:stefanie_jewett@doioig.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [stefanie\\_jewett@doioig.gov](mailto:stefanie_jewett@doioig.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

## Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

### Attachments:

/56. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics

/56. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

**Dorothy Tinker <dorothy.tinker@bsee.gov>**

---

**From:** Dorothy Tinker <dorothy.tinker@bsee.gov>  
**Sent:** Mon Mar 26 2018 06:35:04 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Dorothy Tinker has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [dorothy.tinker@bsee.gov](mailto:dorothy.tinker@bsee.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [dorothy.tinker@bsee.gov](mailto:dorothy.tinker@bsee.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone: (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)

**From:** [dorothy.tinker@bsee.gov](mailto:dorothy.tinker@bsee.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [dorothy.tinker@bsee.gov](mailto:dorothy.tinker@bsee.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----



## Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

### Attachments:

/57. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/57. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

**Brian May <bmay@usgs.gov>**

---

**From:** Brian May <bmay@usgs.gov>  
**Sent:** Mon Mar 26 2018 05:16:54 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Brian May has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwhitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [bmay@usgs.gov](mailto:bmay@usgs.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [bmay@usgs.gov](mailto:bmay@usgs.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [bmay@usgs.gov](mailto:bmay@usgs.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [bmay@usgs.gov](mailto:bmay@usgs.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone: (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

# Conversation Contents

**Accepted: Augmented Awareness Update @ Tue Apr 3, 2018 9am - 9:30am (EDT)**  
(cindy\_cafaro@ios.doi.gov)

## Attachments:

/58. Accepted: Augmented Awareness Update @ Tue Apr 3, 2018 9am - 9:30am (EDT)  
(cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/58. Accepted: Augmented Awareness Update @ Tue Apr 3, 2018 9am - 9:30am (EDT)  
(cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

**Juliette Lillie <juliette\_lillie@ios.doi.gov>**

---

**From:** Juliette Lillie <juliette\_lillie@ios.doi.gov>  
**Sent:** Fri Mar 23 2018 13:10:06 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Augmented Awareness Update @ Tue Apr 3, 2018 9am - 9:30am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Juliette Lillie has accepted this invitation.

### Augmented Awareness Update

**When** Tue Apr 3, 2018 9am – 9:30am Eastern Time

**Where** Julie's Office ([map](#))

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- juliette\_lillie@ios.doi.gov
- robert\_howarth@ios.doi.gov

Invitation from [Google Calendar](#)

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To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [juliette\\_lillie@ios.doi.gov](mailto:juliette_lillie@ios.doi.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [juliette\\_lillie@ios.doi.gov](mailto:juliette_lillie@ios.doi.gov)  
**Subject:** Augmented Awareness Update

---

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)

-----

**From:** [juliette\\_lillie@ios.doi.gov](mailto:juliette_lillie@ios.doi.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [juliette\\_lillie@ios.doi.gov](mailto:juliette_lillie@ios.doi.gov)  
**Subject:** Augmented Awareness Update

---

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)



## Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

### Attachments:

/59. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/59. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics  
/59. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/2.1 invite.ics  
/59. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/2.2 invite.ics

**Ryan Witt <rwitt@blm.gov>**

---

**From:** Ryan Witt <rwitt@blm.gov>  
**Sent:** Fri Mar 23 2018 12:26:05 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Ryan Witt has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

## Ryan Witt <rwitt@blm.gov>

**From:** Ryan Witt <rwitt@blm.gov>  
**Sent:** Fri Mar 23 2018 12:32:30 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Ryan Witt has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
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# Conversation Contents

**Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

## Attachments:

/61. Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics

/61. Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

**Ryan Witt <rwitt@blm.gov>**

---

**From:** Ryan Witt <rwitt@blm.gov>  
**Sent:** Fri Mar 23 2018 12:26:13 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Declined: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Ryan Witt has declined this invitation.

## Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- rwitt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).



**From:** [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [rwitt@blm.gov](mailto:rwitt@blm.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

## Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

### Attachments:

/62. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/62. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

## Lance Purvis <lance.purvis@sol.doi.gov>

**From:** Lance Purvis <lance.purvis@sol.doi.gov>  
**Sent:** Fri Mar 23 2018 12:11:01 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Lance Purvis has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- r Witt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).

**From:** [lance.purvis@sol.doi.gov](mailto:lance.purvis@sol.doi.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [lance.purvis@sol.doi.gov](mailto:lance.purvis@sol.doi.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [lance.purvis@sol.doi.gov](mailto:lance.purvis@sol.doi.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [lance.purvis@sol.doi.gov](mailto:lance.purvis@sol.doi.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

## Conversation Contents

**Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)**

### Attachments:

/63. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.1 invite.ics  
/63. Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)/1.2 invite.ics

**Clarice Julka <clarice\_julka@ios.doi.gov>**

---

**From:** Clarice Julka <clarice\_julka@ios.doi.gov>  
**Sent:** Fri Mar 23 2018 12:00:37 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Accepted: Further Augmented Awareness Discussion @ Tue Apr 3, 2018 10:15am - 11:15am (EDT) (cindy\_cafaro@ios.doi.gov)  
**Attachments:** invite.ics invite.ics

Clarice Julka has accepted this invitation.

### Further Augmented Awareness Discussion

To join the session by phone: (b) (5) passcode: (b) (5)

**When** Tue Apr 3, 2018 10:15am – 11:15am Eastern Time

**Video call** (b) (5)

**Calendar** cindy\_cafaro@ios.doi.gov

**Who**

- cindy\_cafaro@ios.doi.gov - organizer
- carrie\_hyde-michaels@fws.gov
- clarice\_julka@ios.doi.gov
- jessica.rogers@bia.gov
- bmay@usgs.gov
- mescobar@usbr.gov
- oawoniyi@osmre.gov
- lance.purvis@sol.doi.gov
- r Witt@blm.gov
- dorothy.tinker@bsee.gov
- charis\_wilson@nps.gov
- stefanie\_jewett@doioig.gov
- natasha.alcantara@boem.gov
- robert\_howarth@ios.doi.gov - optional

Invitation from [Google Calendar](#)

You are receiving this email at the account cindy\_cafaro@ios.doi.gov because you are subscribed for invitation replies on calendar cindy\_cafaro@ios.doi.gov.

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).



**From:** [clarice\\_julka@ios.doi.gov](mailto:clarice_julka@ios.doi.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [clarice\\_julka@ios.doi.gov](mailto:clarice_julka@ios.doi.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

**From:** [clarice\\_julka@ios.doi.gov](mailto:clarice_julka@ios.doi.gov)  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov); [clarice\\_julka@ios.doi.gov](mailto:clarice_julka@ios.doi.gov)  
**Subject:** Further Augmented Awareness Discussion

---

<span style="white-space: pre-wrap; background-color: rgb(255, 255, 255);">To join the session by phone (b) (5) passcode:  
(b) (5) </span>

-----  
Please do not edit this section of the description.

This event has a Google Hangouts video call.

Join: (b) (5)  
-----

# Conversation Contents

## Agenda for today's meeting

### Attachments:

/65. Agenda for today's meeting/1.1 FOIA Agenda March 2018.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Mar 23 2018 07:34:07 GMT-0600 (MDT)  
**To:** Brian May <bmay@usgs.gov>, Charis Wilson <Charis\_Wilson@nps.gov>, Natasha Alcantara <natasha.alcantara@boem.gov>, Clarice Julka <clarice\_julka@ios.doi.gov>, Lance Purvis <lance.purvis@sol.doi.gov>, Ryan Witt <rwitt@blm.gov>, Oladele Awoniyi <oawoniyi@osmre.gov>, Veronica Herkshan <veronica\_herkshan@ost.doi.gov>, Jessica Rogers <jessica.rogers@bia.gov>, Carrie Hyde-Michaels <carrie\_hyde-michaels@fws.gov>, "Tinker, Dorothy J" <Dorothy.Tinker@bsee.gov>, Stefanie Jewett <stefanie\_jewett@doioig.gov>, Ryan McQuighan <ryan\_mcquighan@ios.doi.gov>  
**CC:** Justin Davis <justin\_davis@ios.doi.gov>, Robert Howarth <robert\_howarth@ios.doi.gov>, Curtis Pierce <cpierce@usbr.gov>, Mary Carlson <mcarlson@usbr.gov>  
**Subject:** Agenda for today's meeting  
**Attachments:** FOIA Agenda March 2018.docx

Hello, everyone. Our next FOIA Officer meeting will take place today at 10:30 AM Eastern via phone and in the North Penthouse of the MIB (please note this is not our usual location).

We are looking forward to speaking with you.

-----  
To join the audio conference  
-----

(b) (5)  
passcode: (b) (5)

Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Agenda

FOIA Officers Meeting  
10:30 a.m. March 23, 2018  
MIB North Penthouse

- I. FOIA Development Document - Everyone
- II. Procedure for Upcoming Audits - Everyone
- III. Augmented Awareness Review -Cindy Cafaro
- IV. Volume, Backlog, and 10 Oldest - Cindy Cafaro & Justin Davis
- V. Proactive Disclosures and Transparency -Everyone
- VI. Housekeeping

# Conversation Contents

## Next FOIA forum

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue Mar 20 2018 11:53:57 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Next FOIA forum

Hello, everyone. Our next quarterly FOIA open forum will be held on Friday, March 23, from 2 PM to 3 PM (ET).

As you know, the forums are very well attended and use all of our available phone lines (while leaving some people unable to join the call). Therefore, *people in and around the District of Columbia are strongly encouraged to attend in person* in room 5056 of the MIB. People from outside the D.C. area are strongly encouraged to meet in groups to call in together. (This will help us include as many people as possible.)

The dial-in numbers for the meeting are as follows:

(b) (5) (Sterling Gateway)

(b) (5) (Denver Gateway)

When prompted for a number, enter (b) (5)

We will again be distributing a written summary of the meeting.

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Mar 23 2018 07:06:45 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Re: Next FOIA forum

Unfortunately, due to a key employee unexpectedly needing to take leave, BSEE cannot host our meeting today. This meeting therefore must be postponed.

I will contact you with our new date as soon as possible.

Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

OS-2018-00959-000251

Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Tue, Mar 20, 2018 at 1:53 PM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

Hello, everyone. Our next quarterly FOIA open forum will be held on Friday, March 23, from 2 PM to 3 PM (ET).

As you know, the forums are very well attended and use all of our available phone lines (while leaving some people unable to join the call). Therefore, *people in and around the District of Columbia are strongly encouraged to attend in person* in room 5056 of the MIB. People from outside the D.C. area are strongly encouraged to meet in groups to call in together. (This will help us include as many people as possible.)

The dial-in numbers for the meeting are as follows:

(b) (5) Sterling Gateway)

(b) (5) (Denver Gateway)

When prompted for a number, enter (b) (5)

We will again be distributing a written summary of the meeting.

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

FOIA forum notes

**Attachments:**

/68. FOIA forum notes/1.1 Quarterly FOIA Forum 1-9-18.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Feb 28 2018 05:16:14 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** FOIA forum notes  
**Attachments:** Quarterly FOIA Forum 1-9-18.docx

Thanks again to everyone who attended the last quarterly forum (and to everyone who tried to attend--we hope to have more phone lines available someday).  
As promised, here are our meeting notes.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181



## Department of the Interior Quarterly FOIA Forum (1.9.18)

- **Forum began at 2:06 DC local time**
- **Opening Remarks**
  - 1. There was an announcement to all attending that this forum would have notes taken which would be subsequently compiled and distributed as minutes.
- **Foreseeable Harm**
  - 1. Discussion of the new [Foreseeable Harm Guidance Memorandum](#) was a focal point of the forum.
  - 2. The new guidance is a result of changes to the foreseeable harm standard, which the FOIA Improvement Act of 2016 changed from a policy to a legal standard.
  - 3. The guidance, issued in December and posted online, is 9 pages long and includes 3 illustrative charts/tables. The chart on the last page contains a breakdown of each FOIA exemption's interaction with the foreseeable harm standard and makes a good "cheat sheet."
- **Training Opportunity**
  - 1. There will be a FOIA Training opportunity in Denver conducted by Bureau of Reclamation in late February/ early March.
  - 2. Tim Murphy and Tony Irish of SOL-DGL will be leading the training.
- **Discussion/Questions**
  - 1. There was a reminder to watch out for fee waiver denials being appropriate (b) (5)  
[REDACTED]
  - 2. There was a suggestion to be aware that requesters may confuse the requirements for expedited requests and fee waiver requests—it is fine to go back and ask them for more information or offer them help if they may be confused.
  - 3. There was discussion regarding what to do with situations where a requester (b) (5) [REDACTED] had left the organization they were working for when they made the FOIA request (b) (5) [REDACTED]. There were suggestions that the processor should at the very minimum reach out to the organization to see if there was continued interest, because the request may have been filed on behalf of the organization rather than the person that signed the request. There was also discussion that perhaps the processor may seek to contact the person who signed the request to see if they are also still interested in the response.
  - 4. There was a reminder that FOIA logs should be updated regularly, although there is no hard and fast timing requirement.
  - 5. There was mention of a recent data call regarding the most frequent FOIA requesters/litigants for DOI. It was emphasized that timely responses to these sorts of data calls are incredibly important and appreciated.
  - 6. There was a discussion in general about litigation.
    - 1. It is critical to coordinate with attorneys in SOL.
    - 2. There has been a spike in DOI FOIA requests and litigation.
    - 3. Consider using the tracking process to improve effectiveness and increase number of responses.
    - 4. Consider requesting detailees and/or contractors.
  - 7. Presubmitted questions to the forum are welcome. One bureau submitted questions the morning of this forum, but technical problems prevented them being printed out to bring to the forum, so it was noted the questions would be responded to directly.
- **Forum adjourned at 2:47 DC local time**

# Conversation Contents

EFTS is having issues

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Feb 21 2018 06:59:13 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** EFTS is having issues

IT is investigating. Please stand by.  
Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Feb 21 2018 07:18:25 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Re: EFTS is having issues

The issues have been resolved. Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Wed, Feb 21, 2018 at 8:59 AM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

IT is investigating. Please stand by.  
Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

## eERDMS and FOIA

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Dec 27 2017 08:45:37 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** eERDMS and FOIA

Hello, everyone. As we have discussed before, as part of ongoing IT modernization efforts, the Department has implemented an "eMail Enterprise Records and Document Management System" (eERDMS). The impact eERDMS will have on FOIA searches has been discussed many times at our monthly Bureau FOIA Officers meetings and quarterly FOIA forums over the last few years.

Many technical, legal, policy, and staffing issues still need to be addressed before the Department's FOIA community will be able to routinely utilize eERDMS. Conversations between my office, the CIO's Office, and SOL are ongoing.

At this time, the most important thing for you to know is that *eERDMS may now be used for FOIA searches when a bureau knows a current employee is, or former employee was, reasonably likely to have responsive emails and his/her emails cannot be searched for and retrieved outside of eERDMS*. For example, this would be the case when:

- a) legacy emails (created before the switch to BisonConnect on January 23, 2013) are present in eERDMS, but the bureau is unable to reach the legacy emails through BisonConnect or its own servers;
- b) a previous employee of a bureau (who now works for another DOI bureau) created emails before he/she left the original bureau and the original bureau is unable to reach the emails through BisonConnect or its own servers; or
- c) a current employee's network and email accounts have been intentionally disabled by the bureau/Department..

If you feel this is the case for a particular request, please speak with your Bureau FOIA Officer. If he/she agrees, he/she will need to contact my office and we will work with the CIO's Office and/or SOL, as appropriate.

Please note that this message supersedes my earlier messages on eERDMS and FOIA. I will update you as soon as it is appropriate to use eERDMS more expansively.

Thank you and happy holidays.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

Lapse in appropriations--READ ASAP

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Jan 22 2018 05:50:33 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Lapse in appropriations--READ ASAP

Hello everyone. In light of current events, please note that as there has been a lapse in appropriations, no FOIA requests may be logged in and no FOIA requests may be processed.

**Those of you with an email address where FOIAs are sent should change your out-of-office messages now to state:**

"Due to the lapse in appropriations, no FOIA requests can be accepted or processed at this time. When the lapse in appropriations is resolved, we will again be able to accept and process FOIA requests."

**Those of you in charge of a website where FOIA requests are submitted should post the same message now.** My office will take care of this for the Department's FOIA website.

Please note that those of us who are furloughed are legally unable to volunteer to work. If you are sent home, you will not be permitted to take any FOIA work (or other work) with you.

Thank you and best wishes.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

Re: Next FOIA forum NUMBER CHANGE

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue Jan 09 2018 12:02:14 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Re: Next FOIA forum NUMBER CHANGE

Please call (b) (5) ex (b) (5)  
Thank you. We will begin in 5 minutes.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Tue, Jan 9, 2018 at 7:29 AM, Cafaro, Cindy <cindy\_cafaro@ios.doi.gov> wrote:  
The forum will proceed as planned; I look forward to speaking with many of you this afternoon.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Mon, Jan 8, 2018 at 1:29 PM, Cafaro, Cindy <cindy\_cafaro@ios.doi.gov> wrote:  
Please note the meeting will be tomorrow, the 9th, again weather permitting.  
Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Mon, Jan 8, 2018 at 1:21 PM, Cafaro, Cindy <cindy\_cafaro@ios.doi.gov> wrote:  
Hello, everyone. Our next quarterly FOIA open forum will be held tomorrow, **weather permitting**, on January 8th, from 2 PM to 3 PM (ET).

As you know, the forums are very well attended and use all of our available phone lines (while leaving some people unable to join the call). Therefore, *people in and around the District of Columbia are strongly encouraged to attend in person* in room 5056 of the MIB. People from outside the D.C. area are strongly encouraged to meet in groups to call in together. (This will help us include as many people as possible.)

The dial-in numbers for the meeting are as follows:

Telecon line:



(b) (5)

Participant code: (b) (5)

We will again be distributing a written summary of the meeting. If the meeting will go forward as scheduled, I will send out another message tomorrow letting you know the meeting is on. If it will not, I will contact you later in the week with rescheduling information.

Stay safe out there and thanks again.

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Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

## Next FOIA forum

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Jan 08 2018 11:21:01 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Next FOIA forum

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Jan 08 2018 11:29:51 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**CC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
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**From:** "Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Sent:** Tue Jan 09 2018 05:29:54 GMT-0700 (MST)  
**To:** Robert Howarth <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)>  
**BCC:** Cat Sam Cat Contact List <[catsamcat\\_contact\\_list@ios.doi.gov](mailto:catsamcat_contact_list@ios.doi.gov)>  
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# Conversation Contents

## Guidance on the Foreseeable Harm Standard

### Attachments:

/74. Guidance on the Foreseeable Harm Standard/1.1 Foreseeable Harm Memo final.pdf  
/74. Guidance on the Foreseeable Harm Standard/2.1 Foreseeable Harm Memo final.pdf  
/74. Guidance on the Foreseeable Harm Standard/7.1 Foreseeable Harm Memo final.pdf  
/74. Guidance on the Foreseeable Harm Standard/9.1 Foreseeable Harm Memo final.pdf

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**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Dec 29 2017 06:58:37 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Guidance on the Foreseeable Harm Standard  
**Attachments:** Foreseeable Harm Memo final.pdf

Good morning. Please find attached a memorandum examining one aspect of the FOIA Improvement Act of 2016-- the foreseeable harm standard. The memorandum provides background on the standard and instructions on when to consult with the SOL and/or seek additional information from a subject matter expert.

If you have any questions or need assistance, please contact your Bureau FOIA Officer or me.

Thank you and happy new year.

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**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Dec 29 2017 07:00:29 GMT-0700 (MST)  
**To:** Justin Davis <justin\_davis@ios.doi.gov>  
**Subject:** Fwd: Guidance on the Foreseeable Harm Standard  
**Attachments:** Foreseeable Harm Memo final.pdf

Hi, Justin. Could you please add this to our guidance page under Interior Policies, Procedures, and Guidance (above Darrell's 2009 guidance)?

Thanks.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

----- Forwarded message -----

From: **Cafaro, Cindy** <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
Date: Fri, Dec 29, 2017 at 8:58 AM  
Subject: Guidance on the Foreseeable Harm Standard  
To: Robert Howarth <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)>

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Direct: 202-208-5342 | Main: 202-208-3181

**"Davis, Justin"** <[justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)>

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**From:** "Davis, Justin" <[justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)>  
**Sent:** Fri Dec 29 2017 07:20:23 GMT-0700 (MST)  
**To:** "Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Subject:** Re: Guidance on the Foreseeable Harm Standard

Hi Cindy,

I've uploaded this to the website. Please let me know if you'd like me to change the description link title at all.

Thanks,

Justin

On Fri, Dec 29, 2017 at 9:00 AM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

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Justin Davis  
Department of the Interior  
Office of the Secretary, FOIA Office  
1849 C Street, NW, MS-7022  
Washington, D.C. 20240  
Telephone: (202) 208-2074  
E-mail: [justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)

**"Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>**

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**From:** "Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Sent:** Fri Dec 29 2017 07:44:40 GMT-0700 (MST)  
**To:** "Davis, Justin" <[justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)>  
**Subject:** Re: Guidance on the Foreseeable Harm Standard

Only tweak--can we make it "Memorandum"? Thanks again, Justin.

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**From:** "Davis, Justin" <[justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)>  
**Sent:** Fri Dec 29 2017 07:52:46 GMT-0700 (MST)  
**To:** "Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Subject:** Re: Guidance on the Foreseeable Harm Standard



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**From:** "Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Sent:** Fri Dec 29 2017 07:58:52 GMT-0700 (MST)  
**To:** "Davis, Justin" <[justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)>  
**Subject:** Re: Guidance on the Foreseeable Harm Standard

Great.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

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**"Gianchetta, Stephanie" <[sgianchetta@usbr.gov](mailto:sgianchetta@usbr.gov)>**

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**From:** "Gianchetta, Stephanie" <[sgianchetta@usbr.gov](mailto:sgianchetta@usbr.gov)>  
**Sent:** Fri Dec 29 2017 09:46:17 GMT-0700 (MST)  
**To:** "Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**CC:** Yadyra Esparza <[yesparza@usbr.gov](mailto:yesparza@usbr.gov)>, "Vijarro, Dorothea M" <[DVijarro@usbr.gov](mailto:DVijarro@usbr.gov)>  
**Subject:** Fwd: Guidance on the Foreseeable Harm Standard  
**Attachments:** Foreseeable Harm Memo final.pdf

Cindy,

Please add Yadyra Esparza and Dorothea Vijarro to this email distribution group. I've cc'd them here so that you have their email addresses. Thank you.

Sincerely,

Stephanie Gianchetta  
Support Services Supervisor  
Property & Office Services  
Bureau of Reclamation  
1150 N. Curtis Road  
Boise, ID 83706  
Office: (208) 378-5121  
Fax: (208) 378-5129  
Email: [sgianchetta@usbr.gov](mailto:sgianchetta@usbr.gov)

----- Forwarded message -----

**From:** **Cafaro, Cindy** <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Date:** Fri, Dec 29, 2017 at 6:58 AM  
**Subject:** Guidance on the Foreseeable Harm Standard  
**To:** Robert Howarth <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)>

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If you have any questions or need assistance, please contact your Bureau FOIA Officer or me.

Thank you and happy new year.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

---

**"Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>**

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OS-2018-00959-000270

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Dec 29 2017 09:57:55 GMT-0700 (MST)  
**To:** "Gianchetta, Stephanie" <sgianchetta@usbr.gov>  
**CC:** Yadyra Esparza <yesparza@usbr.gov>, "Vijarro, Dorothea M" <DVijarro@usbr.gov>  
**Subject:** Re: Guidance on the Foreseeable Harm Standard

No problem, Stephanie. Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Fri, Dec 29, 2017 at 11:46 AM, Gianchetta, Stephanie <[sgianchetta@usbr.gov](mailto:sgianchetta@usbr.gov)> wrote:  
Cindy,

Please add Yadyra Esparza and Dorothea Vijarro to this email distribution group. I've cc'd them here so that you have their email addresses. Thank you.

Sincerely,

Stephanie Gianchetta  
Support Services Supervisor  
Property & Office Services  
Bureau of Reclamation  
1150 N. Curtis Road  
Boise, ID 83706  
Office: (208) 378-5121  
Fax: (208) 378-5129  
Email: [sgianchetta@usbr.gov](mailto:sgianchetta@usbr.gov)

----- Forwarded message -----

From: **Cafaro, Cindy** <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
Date: Fri, Dec 29, 2017 at 6:58 AM  
Subject: Guidance on the Foreseeable Harm Standard  
To: Robert Howarth <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)>

Good morning. Please find attached a memorandum examining one aspect of the FOIA Improvement Act of 2016-- the foreseeable harm standard. The memorandum provides background on the standard and instructions on when to consult with the SOL and/or seek additional information from a subject matter expert.

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**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

OS-2018-00959-000271

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Dec 29 2017 09:58:10 GMT-0700 (MST)  
**To:** Bharati Uppin <bharati\_uppin@ios.doi.gov>  
**Subject:** Fwd: Guidance on the Foreseeable Harm Standard  
**Attachments:** Foreseeable Harm Memo final.pdf

Two to add to the cat list.  
Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

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**"Uppin, Bharati" <bharati\_uppin@ios.doi.gov>**

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**From:** "Uppin, Bharati" <bharati\_uppin@ios.doi.gov>  
**Sent:** Fri Dec 29 2017 10:25:17 GMT-0700 (MST)  
**To:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Subject:** Re: Guidance on the Foreseeable Harm Standard

Done!

On Fri, Dec 29, 2017 at 11:58 AM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

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Bharati Uppin  
Office of the Executive Secretariat  
Department of the Interior  
1849 C street NW, Room 7329  
Washington DC 20240  
Office: 202-208-3373  
Cel: 202-710-6635  
Email: [Bharati\\_Uppin@ios.doi.gov](mailto:Bharati_Uppin@ios.doi.gov)

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Dec 29 2017 10:28:24 GMT-0700 (MST)  
**To:** "Uppin, Bharati" <bharati\_uppin@ios.doi.gov>  
**Subject:** Re: Guidance on the Foreseeable Harm Standard

Great.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Fri, Dec 29, 2017 at 12:25 PM, Uppin, Bharati <[bharati\\_uppin@ios.doi.gov](mailto:bharati_uppin@ios.doi.gov)> wrote:  
Done!

On Fri, Dec 29, 2017 at 11:58 AM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:  
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1849 C street NW, Room 7329  
Washington DC 20240

Office: 202-208-3373

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# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

DEC 20 2017

## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer 

Subject: Foreseeable Harm Standard

### I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### II. Background

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.



standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### *A. When Do You Consult with SOL and/or Seek Additional Information from a SME?*

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| <b>CHART 1</b>  |   |   |
|---|---|---|
| <b>If</b>   | <b>Then</b>                                       | <b>And</b>  |
| You decide no FOIA exemption applies to any portion of a responsive record  | You cannot withhold it                            | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)   |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                          | You must consult with SOL                         | You do not need to seek additional information from a SME (unless SOL suggests you do so)   |
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL  |
|   |   | After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released) |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                 | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)   |

## B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.<sup>6</sup> The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.<sup>7</sup> If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.<sup>8</sup> Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

<sup>6</sup> For example, [these statutes](#) have been found to be covered by Exemption 3.

<sup>7</sup> For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

<sup>8</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.



## 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>9</sup>, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>10</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>11</sup> that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

<sup>9</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>10</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

<sup>11</sup> If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>12</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| CHART 2  |   |  |
|--|---|--|
| Factors to consider when Exemption 5 applies to a record | The factors lead to questions   | And the answers to the questions lead to conclusions   |
| Nature of the decision involved                          | Is it highly sensitive and/or controversial?  | The less sensitive and/or controversial, the less likely foreseeable harm would arise  |
| Nature of the decisionmaking process                     | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise   |
| Status of the decision                                   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise  |
| Status of the personnel involved                         | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise |

<sup>12</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

| <b>CHART 2 (CONT.)</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>  | <b>And the answers to the questions lead to conclusions</b>   |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record                            | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                       | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

#### **ATTACHMENT**

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>Generally Protects this Type of Information</b>  | <b>If this Exemption Applies then Conduct</b> |
|-----------------------|---|---|
| Exemption 1           | Classified national defense and foreign policy information  | No foreseeable harm analysis                  |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency   | Detailed foreseeable harm analysis            |
| Exemption 3           | Information protected from disclosure by another federal statute  | No foreseeable harm analysis                  |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential   | No foreseeable harm analysis                  |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)  | Detailed foreseeable harm analysis            |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed  | Very concise foreseeable harm analysis        |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis        |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision   | Detailed foreseeable harm analysis            |
| Exemption 9           | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis            |






# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

DEC 20 2017

## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer 

Subject: Foreseeable Harm Standard

### I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### II. Background

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### *A. When Do You Consult with SOL and/or Seek Additional Information from a SME?*

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| <b>CHART 1</b>  |   |   |
|---|---|---|
| <b>If</b>   | <b>Then</b>                                       | <b>And</b>  |
| You decide no FOIA exemption applies to any portion of a responsive record  | You cannot withhold it                            | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)   |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                          | You must consult with SOL                         | You do not need to seek additional information from a SME (unless SOL suggests you do so)   |
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL  |
|   |   | After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released) |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                 | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)   |



## B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.<sup>6</sup> The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.<sup>7</sup> If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.<sup>8</sup> Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

<sup>6</sup> For example, [these statutes](#) have been found to be covered by Exemption 3.

<sup>7</sup> For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

<sup>8</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

## 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>9</sup>, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>10</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>11</sup> that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

<sup>9</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>10</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

<sup>11</sup> If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).



- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>12</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| CHART 2  |   |  |
|--|---|--|
| Factors to consider when Exemption 5 applies to a record | The factors lead to questions   | And the answers to the questions lead to conclusions   |
| Nature of the decision involved                          | Is it highly sensitive and/or controversial?  | The less sensitive and/or controversial, the less likely foreseeable harm would arise  |
| Nature of the decisionmaking process                     | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise   |
| Status of the decision                                   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise  |
| Status of the personnel involved                         | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise |

<sup>12</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

| <b>CHART 2 (CONT.)</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>  | <b>And the answers to the questions lead to conclusions</b>   |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record                            | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                       | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

#### **ATTACHMENT**

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior



## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>Generally Protects this Type of Information</b>  | <b>If this Exemption Applies then Conduct</b> |
|-----------------------|---|---|
| Exemption 1           | Classified national defense and foreign policy information  | No foreseeable harm analysis                  |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency   | Detailed foreseeable harm analysis            |
| Exemption 3           | Information protected from disclosure by another federal statute  | No foreseeable harm analysis                  |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential   | No foreseeable harm analysis                  |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)  | Detailed foreseeable harm analysis            |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed  | Very concise foreseeable harm analysis        |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis        |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision   | Detailed foreseeable harm analysis            |
| Exemption 9           | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis            |




# United States Department of the Interior

OFFICE OF THE SECRETARY  
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## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer 

Subject: Foreseeable Harm Standard

### I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### II. Background

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| CHART 1   |   |   |
|---|---|---|
| If  | Then  | And   |
| You decide no FOIA exemption applies to any portion of a responsive record  | You cannot withhold it                            | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)   |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                          | You must consult with SOL                         | You do not need to seek additional information from a SME (unless SOL suggests you do so)   |
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL  |
|   |   | After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released) |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                 | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)   |



## B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.<sup>6</sup> The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.<sup>7</sup> If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.<sup>8</sup> Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

<sup>6</sup> For example, [these statutes](#) have been found to be covered by Exemption 3.

<sup>7</sup> For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

<sup>8</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

## 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>9</sup>, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>10</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>11</sup> that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

<sup>9</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>10</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

<sup>11</sup> If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).



- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>12</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| CHART 2  |   |  |
|--|---|--|
| Factors to consider when Exemption 5 applies to a record | The factors lead to questions   | And the answers to the questions lead to conclusions   |
| Nature of the decision involved                          | Is it highly sensitive and/or controversial?  | The less sensitive and/or controversial, the less likely foreseeable harm would arise  |
| Nature of the decisionmaking process                     | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise   |
| Status of the decision                                   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise  |
| Status of the personnel involved                         | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise |

<sup>12</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

| <b>CHART 2 (CONT.)</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>  | <b>And the answers to the questions lead to conclusions</b>   |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record                            | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                       | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the



foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

#### **ATTACHMENT**

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>Generally Protects this Type of Information</b>  | <b>If this Exemption Applies then Conduct</b> |
|-----------------------|---|---|
| Exemption 1           | Classified national defense and foreign policy information  | No foreseeable harm analysis                  |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency   | Detailed foreseeable harm analysis            |
| Exemption 3           | Information protected from disclosure by another federal statute  | No foreseeable harm analysis                  |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential   | No foreseeable harm analysis                  |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)  | Detailed foreseeable harm analysis            |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed  | Very concise foreseeable harm analysis        |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis        |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision   | Detailed foreseeable harm analysis            |
| Exemption 9           | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis            |




# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

DEC 20 2017

## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer 

Subject: Foreseeable Harm Standard

### I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### II. Background

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### *A. When Do You Consult with SOL and/or Seek Additional Information from a SME?*

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| CHART 1   |   |   |
|---|---|---|
| If  | Then  | And   |
| You decide no FOIA exemption applies to any portion of a responsive record  | You cannot withhold it                            | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)   |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                          | You must consult with SOL                         | You do not need to seek additional information from a SME (unless SOL suggests you do so)   |
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL  |
|   |   | After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released) |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                 | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)   |



## B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.<sup>6</sup> The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.<sup>7</sup> If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.<sup>8</sup> Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

<sup>6</sup> For example, [these statutes](#) have been found to be covered by Exemption 3.

<sup>7</sup> For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

<sup>8</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.



## 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>9</sup>, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>10</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>11</sup> that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

<sup>9</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>10</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

<sup>11</sup> If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>12</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| CHART 2  |   |  |
|--|---|--|
| Factors to consider when Exemption 5 applies to a record | The factors lead to questions   | And the answers to the questions lead to conclusions   |
| Nature of the decision involved                          | Is it highly sensitive and/or controversial?  | The less sensitive and/or controversial, the less likely foreseeable harm would arise  |
| Nature of the decisionmaking process                     | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise   |
| Status of the decision                                   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise  |
| Status of the personnel involved                         | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise |

<sup>12</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

| <b>CHART 2 (CONT.)</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>  | <b>And the answers to the questions lead to conclusions</b>   |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record                            | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                       | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

#### **ATTACHMENT**

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>Generally Protects this Type of Information</b>  | <b>If this Exemption Applies then Conduct</b> |
|-----------------------|---|---|
| Exemption 1           | Classified national defense and foreign policy information  | No foreseeable harm analysis                  |
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| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed  | Very concise foreseeable harm analysis        |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis        |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision   | Detailed foreseeable harm analysis            |
| Exemption 9           | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis            |



# Conversation Contents

## Foreseeable harm draft and comp version

### Attachments:

/75. Foreseeable harm draft and comp version/1.1 Foreseeable Harm 12.26.17.docx  
/75. Foreseeable harm draft and comp version/1.2 Foreseeable Harm compare doc for Darrell 12.28.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu Dec 28 2017 08:47:53 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Foreseeable harm draft and comp version  
**Attachments:** Foreseeable Harm 12.26.17.docx Foreseeable Harm compare doc for Darrell 12.28.17.docx

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181



## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

### **I. Introduction**

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### **II. Background**

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| <b>CHART 1</b>  |   |   |
|---|---|---|
| <b>If</b>   | <b>Then</b>                                       | <b>And</b>  |
| You decide no FOIA exemption applies to any portion of a responsive record  | You cannot withhold it                            | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)   |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                          | You must consult with SOL                         | You do not need to seek additional information from a SME (unless SOL suggests you do so)   |
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL  |
|   |   | After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released) |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                 | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)   |

## *B. What Type of Foreseeable Harm Analysis is Needed?*

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information may be covered by *Exemption 4*. If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.<sup>6</sup> Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect:

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<sup>6</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>7</sup>, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>8</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>9</sup> that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>10</sup>

<sup>7</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>8</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

<sup>9</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

<sup>10</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| <b>CHART 2</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>  | <b>And the answers to the questions lead to conclusions</b>   |
| Nature of the decision involved                                 | Is it highly sensitive and/or controversial?  | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process                            | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision  | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved                                | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise        |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?    | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise |

privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.



| <b>CHART 2 (CONT.)</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>  | <b>And the answers to the questions lead to conclusions</b>   |
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record                            | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                       | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You

must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>Generally Protects this Type of Information</b>  | <b>Conduct</b>                         |
|-----------------------|---|--|
| Exemption 1           | Classified national defense and foreign policy information  | No foreseeable harm analysis           |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency   | Detailed foreseeable harm analysis     |
| Exemption 3           | Information protected from disclosure by another federal statute  | No foreseeable harm analysis           |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential   | No foreseeable harm analysis           |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)  | Detailed foreseeable harm analysis     |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed  | Very concise foreseeable harm analysis |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision   | Detailed foreseeable harm analysis     |
| Exemption 9           | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis     |

## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

### I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### II. Background

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and either* you decide that foreseeable harm would result from the record's release. (b) (5)

If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> ~~Additionally~~ Also, seeking additional information from a SME (in other words, reaching out to a SME for ~~additional~~ relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because *either* you decide foreseeable harm would result from the release of the record, (b) (5) *you must consult with SOL.*
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| <b>CHART 1</b>   |                           |   |
|--|---------------------------|---|
| <b>If</b>  | <b>Then</b>               | <b>And</b>  |
| You decide no FOIA exemption applies to any portion of a responsive record   | You cannot withhold it    | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released) |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You must consult with SOL | You do not need to seek additional information from a SME (unless SOL suggests you do so)   |

(b) (5)

|   |   |   |
|---|---|---|
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL  |
|   |   | After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released) |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the  | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)   |



|  |  |  |
|--|--|--|
| release of the record (or portion of it) |  |  |
|--|--|--|

### B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or **(b) (5)** (see subsection III.B.1 below).

#### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and ~~some~~ confidential or privileged commercial and financial information may be covered by *Exemption 4*. If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act.<sup>6</sup> A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from

<sup>6</sup>This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

disclosure by law.<sup>7</sup> Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>8</sup>, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward. (b) (5)

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>9</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview

<sup>7</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

<sup>8</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>9</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

questions that are reused for particular vacant positions would ~~interfere~~ be the resulting interference with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>10</sup> that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>11</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| CHART 2  |                               |  |
|--|-------------------------------|--|
| Factors to consider when Exemption 5 applies to a record | The factors lead to questions | And the answers to the questions lead to conclusions |

<sup>10</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

<sup>11</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

|   |   |   |
|---|---|---|
| Nature of the decision involved                                 | Is it highly sensitive and/or controversial?  | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process                            | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision  | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved                                | Will the same agency employees, or similarly situated ones, likely be affected by disclosure?               | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise  |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| <b>CHART 2 (CONT.)</b>  |   |   |
| <u>Factors to consider when Exemption 5 applies to a record</u> | <u>The factors lead to questions</u>  | <u>And the answers to the questions lead to conclusions</u>   |
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| <b>CHART 2 (CONT.)</b>  |   |   |
| <u>Factors to consider when Exemption 5 applies to a record</u> | <u>The factors lead to questions</u>  | <u>And the answers to the questions lead to conclusions</u>   |
| Age of the information in the record                            | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                       | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

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As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can

be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| This Exemption | <del>May Protect</del> <u>Generally Protects</u> this Type of Information   | Conduct                                |
|----------------|---|--|
| Exemption 1    | Classified national defense and foreign policy information  | No foreseeable harm analysis           |
| Exemption 2    | Information related solely to the internal personnel rules and practices of an agency   | Detailed foreseeable harm analysis     |
| Exemption 3    | Information protected from disclosure by another federal <del>law</del> <u>statute</u>  | No foreseeable harm analysis           |
| Exemption 4    | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential   | No foreseeable harm analysis           |
| Exemption 5    | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)  | Detailed foreseeable harm analysis     |
| Exemption 6    | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed  | Very concise foreseeable harm analysis |
| Exemption 7    | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose <u>1) techniques, guidelines, or and procedures for law enforcement investigations or prosecutions</u> <del>and disclosure of the techniques, or 2) guidelines, for law enforcement investigations or procedures</del> <u>prosecutions and that</u> could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis |
| Exemption 8    | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision   | Detailed foreseeable harm analysis     |
| Exemption 9    | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis     |



# Conversation Contents

Foreseeable harm

**Attachments:**

/76. Foreseeable harm/1.1 Foreseeable Harm 12.7.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue Dec 26 2017 10:19:06 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Foreseeable harm  
**Attachments:** Foreseeable Harm 12.7.17.docx

Last draft? Thanks again!

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

### I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### II. Background

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* either you decide that foreseeable harm would result from the record's release (b) (5)

. If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Additionally, seeking additional information from a SME (in other words, reaching out to a SME for additional relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because either you decide foreseeable harm would result from the release of the record (b) (5) you must consult with SOL.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| CHART 1   |   |   |
|---|---|---|
| If  | Then  | And   |
| You decide no FOIA exemption applies to any portion of a responsive record  | You cannot withhold it                            | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)   |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                          | You must consult with SOL                         | You do not need to seek additional information from a SME (unless SOL suggests you do so)   |
| <b>(b) (5)</b>  |   |   |
|   |   |   |
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL  |
|   |   | After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released) |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                 | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)   |

### B. What Type of Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure (see subsections III.B.2 and 3 below) <sup>(b)(7)(D)</sup> (see subsection III.B.1 below).

#### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and some confidential commercial and financial information may be covered by *Exemption 4*. If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act.<sup>6</sup> A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law. Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect:

<sup>6</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>7</sup>, however, and they therefore were not excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>8</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would interfere with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>9</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.<sup>10</sup>

<sup>7</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>8</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

<sup>9</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

<sup>10</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it)



- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| <b>CHART 2</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>  | <b>And the answers to the questions lead to conclusions</b>   |
| Nature of the decision involved                                 | Is it highly sensitive and/or controversial?  | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process                            | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision  | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved                                | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise        |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?    | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise |

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under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

|   |   |   |
|---|---|---|
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| <b>CHART 2 (CONT.)</b>  |   |   |
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As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

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When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You

must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

#### **ATTACHMENT**

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>May Protect this Type of Information</b>  | <b>Conduct</b>                         |
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# Conversation Contents

**Fwd: Foreseeable Harm Guidance**

**Attachments:**

/77. Fwd: Foreseeable Harm Guidance/1.1 image001.gif  
/77. Fwd: Foreseeable Harm Guidance/1.2 Foreseeable Harm Statements Guidance.pdf  
/77. Fwd: Foreseeable Harm Guidance/2.1 Foreseeable Harm Statements Guidance.pdf  
/77. Fwd: Foreseeable Harm Guidance/3.1 image001.gif  
/77. Fwd: Foreseeable Harm Guidance/3.2 Foreseeable Harm Statements Guidance.pdf  
/77. Fwd: Foreseeable Harm Guidance/4.1 Foreseeable Harm Statements Guidance.pdf

**Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>**

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**From:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Sent:** Tue Oct 03 2017 09:14:56 GMT-0600 (MDT)  
**To:** Cindy Cafaro <cindy\_cafaro@ios.doi.gov>  
**Subject:** Fwd: Foreseeable Harm Guidance  
**Attachments:** image001.gif Foreseeable Harm Statements Guidance.pdf

Darrell Strayhorn  
FOIA & Privacy Act Appeals Officer  
Department of the Interior  
(202) 208-5339

Begin forwarded message:

**From:** "Strayhorn, Darrell" <[darrell.strayhorn@sol.doi.gov](mailto:darrell.strayhorn@sol.doi.gov)>  
**Date:** May 14, 2013 at 11:03:33 AM EDT  
**To:** Cindy Cafaro <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Subject:** Fwd: Foreseeable Harm Guidance

----- Forwarded message -----  
**From:** **Strayhorn, Darrell**  
**Date:** Tuesday, June 14, 2011  
**Subject:** Foreseeable Harm Guidance  
**To:** "Mott, Vicki" <[Vicki.Mott@sol.doi.gov](mailto:Vicki.Mott@sol.doi.gov)>

As discussed.

Darrell R. Strayhorn

FOIA & Privacy Act Appeals Officer

Department of the Interior

(202) 208-5339

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**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu Dec 21 2017 14:20:41 GMT-0700 (MST)  
**To:** Justin Davis <justin\_davis@ios.doi.gov>  
**Subject:** Fwd: Foreseeable Harm Guidance  
**Attachments:** Foreseeable Harm Statements Guidance.pdf

As we discussed, for the Interior Policies portion of the website (I'd put it in towards the middle of the section, roughly chronologically, unless you prefer another placement). Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

----- Forwarded message -----

From: **Strayhorn, Darrell**  
Date: Tuesday, June 14, 2011  
Subject: Foreseeable Harm Guidance  
To: "Mott, Vicki" <[Vicki.Mott@sol.doi.gov](mailto:Vicki.Mott@sol.doi.gov)>

**"Davis, Justin" <justin\_davis@ios.doi.gov>**

---

**From:** "Davis, Justin" <justin\_davis@ios.doi.gov>

OS-2018-00959-000343

**Sent:** Thu Dec 21 2017 14:35:40 GMT-0700 (MST)  
**To:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Subject:** Re: Foreseeable Harm Guidance

Hi Cindy,

I've uploaded that guidance to the DOI FOIA Guidance webpage. I've created a link titled "Foreseeable Harm Statements Guidance (May 29, 2009)". The guidance can be found directly at this address: [https://www.doi.gov/sites/doi.gov/files/uploads/foreseeable\\_harm\\_statements\\_guidance.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/foreseeable_harm_statements_guidance.pdf)

On Thu, Dec 21, 2017 at 4:20 PM, Cafaro, Cindy <cindy\_cafaro@ios.doi.gov> wrote:

As we discussed, for the Interior Policies portion of the website (I'd put it in towards the middle of the section, roughly chronologically, unless you prefer another placement). Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

----- Forwarded message -----

From: **Strayhorn, Darrell**  
Date: Tuesday, June 14, 2011  
Subject: Foreseeable Harm Guidance  
To: "Mott, Vicki" <[Vicki.Mott@sol.doi.gov](mailto:Vicki.Mott@sol.doi.gov)>

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Justin Davis  
Department of the Interior  
Office of the Secretary, FOIA Office  
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Washington, D.C. 20240  
Telephone: (202) 208-2074  
E-mail: [justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)

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**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu Dec 21 2017 14:38:32 GMT-0700 (MST)  
**To:** "Davis, Justin" <justin\_davis@ios.doi.gov>  
**Subject:** Re: Foreseeable Harm Guidance



Thanks again!

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Thu, Dec 21, 2017 at 4:35 PM, Davis, Justin <[justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)> wrote:

Hi Cindy,

I've uploaded that guidance to the DOI FOIA Guidance webpage. I've created a link titled "Forseeable Harm Statements Guidance (May 29, 2009)". The guidance can be found directly at this address: [https://www.doi.gov/sites/doi.gov/files/uploads/foreseeable\\_harm\\_statements\\_guidance.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/foreseeable_harm_statements_guidance.pdf)

On Thu, Dec 21, 2017 at 4:20 PM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

As we discussed, for the Interior Policies portion of the website (I'd put it in towards the middle of the section, roughly chronologically, unless you prefer another placement). Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

----- Forwarded message -----

From: **Strayhorn, Darrell**

Date: Tuesday, June 14, 2011

Subject: Foreseeable Harm Guidance

To: "Mott, Vicki" <[Vicki.Mott@sol.doi.gov](mailto:Vicki.Mott@sol.doi.gov)>

--

Justin Davis  
Department of the Interior  
Office of the Secretary, FOIA Office  
[1849 C Street, NW](#), MS-7022  
Washington, D.C. 20240  
Telephone: (202) 208-2074  
E-mail: [justin\\_davis@ios.doi.gov](mailto:justin_davis@ios.doi.gov)





**U.S. Department of the Interior**

**Office of the Solicitor**

Division of Administration  
FOIA Appeals Branch  
1849 C Street, N.W., MS 6556  
Washington, D.C. 20240

**May 29, 2009**

**ORIGINALLY SENT VIA E-MAIL**

**Re: Preparing Foreseeable Harm Statements for FOIA Appeals**

On March 19, 2009, Attorney General Eric Holder issued a memorandum outlining the Department of Justice's (DOJ) guidelines on the FOIA (copy attached). In his memorandum, Attorney General Holder states, among other things, that DOJ will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.

Since the FOIA Appeals Office provides the final level of administrative review before a requester may file a lawsuit challenging the denial of a FOIA request, this Office will require Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold documents (or portions of documents) based on FOIA exemptions (2), (5), and (9). For FOIA appeals that challenge a bureau's/office's decision to withhold documents (or portions of documents) based on any of the remaining FOIA exemptions, the FOIA Appeals Office will request Foreseeable Harm Statements only when it can not reasonably ascertain the harm that would come from the disclosure of the documents.

Starting immediately, the FOIA Appeal Route Slips that this Office sends to you transmitting new FOIA appeals will include a section advising you whether a Foreseeable Harm Statement is required for a particular appeal. Also, for the FOIA appeals that are currently pending related to your bureau, where appropriate, the FOIA Appeals Office will send new FOIA Appeal Route Slips requesting that you provide Foreseeable Harm Statements for those appeals as well.

I have outlined below the information that you must include in Foreseeable Harm Statements that you and other FOIA professionals in your bureau/office prepare, as well as some matters that you should consider when preparing these documents.

**GUIDELINES FOR FORESEEABLE HARM STATEMENTS**

When preparing the Foreseeable Harm Statements, please address each withheld document or partially withheld document separately. If the bureau/office has withheld a group of documents (in full or in part) where the subject matter of each of those documents focuses on the same topic, you may address each of the below items (except item 6) in terms of categories of documents. For example, if a bureau/office withheld 10 iterations of a draft document *or* seven e-mail messages from members of a panel to the selection official all discussing who to hire, it is

appropriate to discuss their withholding in terms of categories. Be sure to identify the number of documents that you have grouped into a particular category.

1. For each withheld document or, if appropriate, category of documents, explain the rationale the bureau/office used to justify the invocation of the exemption; and
2. For each withheld document or, if appropriate, category of documents, explain how disclosure could reasonably be foreseen to cause harm to the interest that the exemption or privilege was designed to protect.
3. Confirmation that: **(a)** the bureau/office performed a line-by-line, page-by-page review of each of the withheld documents in an effort to identify exempt and non-exempt information; and **(b)** it has segregated and released all of the information in the documents that it determined was not exempt from disclosure by any of the FOIA exemptions it invoked.

For appeals that challenge a bureau's/office's decision to invoke the **deliberative process privilege of exemption (5)**, in addition to providing the above information, please also provide the following:

4. Explanation of the deliberative process to which each withheld document (or category of documents) relates;
5. Explanation of the role that each withheld document (or category of documents) played in the course of that deliberative process;
6. For each withheld or partially withheld document, explain the harm to the deliberative process if the document is released. Please do not use the standard exemption (5) language, e.g., "to protect against public confusion, to protect against premature disclosure of proposed policies before they are finally adopted, etc.," because you need to demonstrate more than that the document is protected from release by exemption (5). For example, address one or more of the following:
  - (a) Explain how the public would be confused by the release of a particular document.
  - (b) Is the information in the document premature and subject to change upon review by others in the office?
  - (c) Was the information reviewed and rejected by decisionmakers?
  - (d) Is the information in the document a part of an ongoing process awaiting approval by decisionmakers?
  - (e) What is the status of the deliberative process involved?
  - (f) How controversial is the issue over which the document was prepared?

Please also provide any other information that you believe will assist the Department in assessing the foreseeable harm that is likely to come from disclosure of the withheld documents or information.

7. Was the factual information in **each** document segregated and released? If not, explain why. To withhold factual information in any of the documents, for **each piece of factual information in each document** you **must** be able to answer yes to **one** of the following questions:

(a) Did the author(s) of the document(s) select specific facts out of a larger group of facts (where the authors are using their judgment to separate significant facts from insignificant facts) to make a recommendation to or for the benefit of the decisionmaker? If yes, explain.

(b) Is the factual information so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations. In other words, would the release of any factual information be tantamount to revealing the agency's deliberations? If yes, explain.

(c) Is it impossible to reasonably segregate meaningful portions of the factual information from the deliberative information? In other words, is the factual information so minimal that segregation would render the document nonsensical? If yes, explain.

If, after conducting a **line-by-line, page-by-page** review of each document, you determine that there is factual information that does not fall into one of the three categories listed under paragraph 7 (a)-(c), above, that information must be released. Please identify that factual information in order to assist the Department with its administrative review of the bureau's/office's action.

Also, please consult with your appropriate FOIA Attorney when preparing the harm statement and have that individual review and surname the Foreseeable Harm Statement prior to forwarding it to the FOIA Appeals Office.

As always, thank you for your continued cooperation. If you have any questions regarding this matter, please call me at (202) 208-5339.



Darrell R. Strayhorn  
FOIA & Privacy Act Appeals Officer  
Department of the Interior



**U.S. Department of the Interior**

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Darrell R. Strayhorn  
FOIA & Privacy Act Appeals Officer  
Department of the Interior

# Conversation Contents

## U.S. Department of Justice Daily Digest Bulletin

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue Dec 19 2017 09:07:11 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Fwd: U.S. Department of Justice Daily Digest Bulletin

Good morning, everyone. Please note that DOJ has published its list of FOIA training opportunities for the remainder of FY18. This is good, free training and it fills up quickly. You may wish to take advantage of it.

Thanks and best wishes for a wonderful holiday season

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

----- Forwarded message -----

**From:** U.S. Department of Justice <[usdoj@public.govdelivery.com](mailto:usdoj@public.govdelivery.com)>  
**Date:** Mon, Dec 18, 2017 at 11:06 PM  
**Subject:** U.S. Department of Justice Daily Digest Bulletin  
**To:** [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)

## OIP Announces Upcoming Training Dates

12/18/2017

You are subscribed to OIP FOIA Post for U.S. Department of Justice. This information has recently been updated, and is now available.

### **[OIP Announces Upcoming Training Dates](#)**

12/18/2017 12:00 AM EST

Registration is now open for several FOIA training courses for the second quarter of Fiscal Year 2018 on OIP's new Eventbrite page.



use your subscription information for any other purposes.

[Manage your Subscriptions](#) | [Department of Justice Privacy Policy](#) | [GovDelivery Privacy Policy](#)

# Conversation Contents

## POSTPONED Next FOIA forum

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Dec 11 2017 10:27:10 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** POSTPONED Next FOIA forum

I am very sorry for the inconvenience, but unexpectedly the forum must be postponed until January. I am working to reschedule and will be in touch as soon as possible.  
Thank you and best wishes for wonderful holidays.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Fri, Dec 8, 2017 at 10:27 AM, Cafaro, Cindy <cindy\_cafaro@ios.doi.gov> wrote:

Please make that Tuesday December 12th. Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Fri, Dec 8, 2017 at 10:19 AM, Cafaro, Cindy <cindy\_cafaro@ios.doi.gov> wrote:

Hello, everyone. Our next quarterly FOIA open forum will be held on Tuesday, December 11th, from 2 PM to 3 PM (ET).

As you know, the forums are very well attended and use all of our available phone lines (while leaving some people unable to join the call). Therefore, *people in and around the District of Columbia are strongly encouraged to attend in person* in room 5056 of the MIB. People from outside the D.C. area are strongly encouraged to meet in groups to call in together. (This will help us include as many people as possible.)

The dial-in numbers for the meeting are as follows:

Telecon line:

(b) (5)

Participant code: (b) (5)

We will again be distributing a written summary of the meeting.

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

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# Conversation Contents

## Next FOIA forum

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Dec 08 2017 08:19:54 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Dec 08 2017 08:27:17 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Re: Next FOIA forum

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## Conversation Contents

Next draft foreseeable harm

**Attachments:**

/81. Next draft foreseeable harm/1.1 Foreseeable Harm 12.5.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu Dec 07 2017 07:38:03 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Next draft foreseeable harm  
**Attachments:** Foreseeable Harm 12.5.17.docx

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau and Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

### **I. Introduction**

This memorandum examines one aspect of the FOIA Improvement Act of 2016—foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from subject matter experts (SMEs).

### **II. Background**

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult with SOL and/or Seek Additional Information from the SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* either foreseeable harm would result from the record's release (b) (5)

If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Additionally, seeking additional information from the SME (in other words, reaching out to the SME for additional relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable—SEE CHART 1.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not have to consult with SOL (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold it because (b) (5) you believe foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) that is covered by an exemption because you believe no foreseeable harm would result from the disclosure, *seek additional information from the SME* before taking further steps.
- If you are not sure whether to release or withhold it because you don't know if an exemption applies or foreseeable harm would result, *seek additional information from the SME* before taking further steps.

<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA. See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

| <b>CHART 1</b>  |                           |   |
|---|---------------------------|---|
| <b>If</b>   | <b>Then</b>               | <b>And</b>  |
| No FOIA exemption applies to any portion of a responsive record   | You cannot withhold it    | You do not have to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from the SME (although you can alert people that the record is going to be released) |
| You believe an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You must consult with SOL | You do not have to seek additional information from the SME (unless SOL suggests you do so)   |

**(b) (5)**

|   |  |  |
|---|--|--|
| You are not sure whether an exemption applies to a responsive record (or portion of it) or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | Seek additional information from the SME | After considering the additional information, if you believe an exemption applies and foreseeable harm is present, you must consult with SOL   |
|   |  | After considering the additional information, if you believe an exemption does not apply and/or foreseeable harm is not present, you do not have to consult with SOL (although you can alert people that the record is going to be released) |
| You believe an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)            | Seek additional information from the SME | You do not need to consult with SOL (unless considering the additional information provided by the SME changes your decision and you plan on withholding the record in full or in part)  |

## B. What Type of Analysis is Needed?

As discussed above, if a FOIA exemption applies to a responsive record (or portion of it), you must also (b) (5) (see subsection III.B.1 below) or whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure (see subsections III.B.2 and 3, below).

### 1. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The FOIA explicitly notes that a foreseeable harm analysis is not necessary for them.
- Records that contain trade secrets and some confidential commercial and financial information are covered by *Exemption 4*. They are also protected by the Trade Secrets Act<sup>5</sup>, so a determination by an agency that a record (or portion of it) is protected by Exemption 4 is generally equivalent to a decision that it is protected by the Trade Secrets Act and is prohibited from disclosure by law. Therefore, a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 2. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>6</sup>, however, so Congress did not exclude them from a foreseeable harm

<sup>5</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

<sup>6</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 3. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>7</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would interfere with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>8</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>9</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for

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<sup>7</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

<sup>8</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

<sup>9</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (as discussed further below in CHART 2) would harm an interest protected by Exemption 5.

legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative*—SEE CHART 2.

| <b>CHART 2</b>  |   |   |
|---|---|---|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors leads to questions</b>   | <b>And the answers to the questions lead to conclusions</b>   |
| Nature of the decision involved                                 | Is it highly sensitive and/or controversial   | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process                            | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision  | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved                                | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise        |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?    | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise |
| Significance of any process impairment                          | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |



|  | <b>CHART 2<br/>(cont.)</b>  |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Age of the information in the record   | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                                    | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>May Protect this Type of Information</b>  | <b>Conduct</b>                         |
|-----------------------|--|--|
| Exemption 1           | Classified national defense and foreign policy information   | No foreseeable harm analysis           |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency  | Detailed foreseeable harm analysis     |
| Exemption 3           | Information protected from disclosure by another federal law   | No foreseeable harm analysis           |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential  | No foreseeable harm analysis           |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)   | Detailed foreseeable harm analysis     |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed   | Very concise foreseeable harm analysis |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose techniques, guidelines, or procedures for law enforcement investigations or prosecutions and disclosure of the techniques, guidelines, or procedures could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision  | Detailed foreseeable harm analysis     |
| Exemption 9           | Geological or geophysical information concerning wells   | Detailed foreseeable harm analysis     |

# Conversation Contents

Post Tim draft

**Attachments:**

/82. Post Tim draft/1.1 Foreseeable Harm 12.4.17post tim.docx  
/82. Post Tim draft/2.1 Foreseeable Harm 12.4.17post tim.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Dec 04 2017 13:23:20 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Post Tim draft  
**Attachments:** Foreseeable Harm 12.4.17post tim.docx

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Dec 04 2017 13:25:39 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Re: Post Tim draft  
**Attachments:** Foreseeable Harm 12.4.17post tim.docx

Ignore that one. Please look at this one.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Mon, Dec 4, 2017 at 3:23 PM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau and Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

### **I. Introduction**

This memorandum examines one aspect of the FOIA Improvement Act of 2016—foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from subject matter experts (SMEs).

### **II. Background**

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult with SOL and/or Seek Additional Information from the SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* either foreseeable harm would result from the record's release (b) (5)

If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Additionally, seeking additional information from the SME (in other words, reaching out to the SME for additional relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable—SEE CHART 1.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not have to consult with SOL (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold it because (b) (5) you believe foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) that is covered by an exemption because you believe no foreseeable harm would result from the disclosure, *seek additional information from the SME* before taking further steps.
- If you are not sure whether to release or withhold it because you don't know if an exemption applies or foreseeable harm would result, *seek additional information from the SME* before taking further steps.

<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA. See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

| <b>CHART 1</b>  |                           |   |
|---|---------------------------|---|
| <b>If</b>   | <b>Then</b>               | <b>And</b>  |
| No FOIA exemption applies to any portion of a responsive record   | You cannot withhold it    | You do not have to conduct a foreseeable harm analysis or consult with SOL, although you can alert people that the record is going to be released |
| You believe an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You must consult with SOL | You do not have to seek additional information from the SME   |

**(b) (5)**

|   |  |   |
|---|--|---|
| You are not sure whether an exemption applies to a responsive record (or portion of it) or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | Seek additional information from the SME | After considering the additional information, if you believe an exemption applies and foreseeable harm is present, you must consult with SOL  |
|   |  | After considering the additional information, if you believe an exemption does not apply and/or foreseeable harm is not present, you do not have to consult with SOL, although you can alert people that the record is going to be released |
| You believe an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)            | Seek additional information from the SME | You do not need to consult with SOL unless after considering the additional information provided by the SME you changes your decision and you plan on withholding the record in full or in part   |



## B. What Type of Analysis is Needed?

As discussed above, if a FOIA exemption applies to a responsive record (or portion of it), you must also determine (b) (5) (see subsection III.B.1 below) or whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure (see subsections III.B.2 and 3, below).

### 1. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The FOIA explicitly notes that a foreseeable harm analysis is not necessary for them.
- Records that contain trade secrets and some confidential commercial and financial information are covered by *Exemption 4*. They are also protected by the Trade Secrets Act<sup>5</sup>, so a determination by an agency that a record (or portion of it) is protected by Exemption 4 is generally equivalent to a decision that it is protected by the Trade Secrets Act and is prohibited from disclosure by law. Therefore, a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 2. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>6</sup>, however, so Congress did not exclude them from a foreseeable harm

<sup>5</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

<sup>6</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 3. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>7</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would interfere with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>8</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or unformed decisionmaking, and public confusion.<sup>9</sup>
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<sup>7</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

<sup>8</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

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legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative*—SEE CHART 2.

| <b>CHART 2</b>   |   |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Nature of the decision involved  | Is it highly sensitive and/or controversial   | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process   | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved   | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise        |
| Potential for process impairment   | Would there be an actual diminishment if employees felt inhibited by potential disclosure?    | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise |
| Significance of any process impairment                                       | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |

|  | <b>CHART 2<br/>(cont.)</b>  |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Age of the information in the record   | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                                    | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

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When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

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## Memorandum

To: Bureau and Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

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standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult with SOL and/or Seek Additional Information from the SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* either foreseeable harm would result from the record's release (b) (5)

If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Additionally, seeking additional information from the SME (in other words, reaching out to the SME for additional relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable—SEE CHART 1.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not have to consult with SOL (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold it because (b) (5) you believe foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) that is covered by an exemption because you believe no foreseeable harm would result from the disclosure, *seek additional information from the SME* before taking further steps.
- If you are not sure whether to release or withhold it because you don't know if an exemption applies or foreseeable harm would result, *seek additional information from the SME* before taking further steps.

<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA. See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

| <b>CHART 1</b>  |  |   |
|---|--|---|
| <b>If</b>   | <b>Then</b>                              | <b>And</b>  |
| No FOIA exemption applies to any portion of a responsive record   | You cannot withhold it                   | You do not have to conduct a foreseeable harm analysis or consult with SOL, although you can alert people that the record is going to be released   |
| You believe an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                     | You must consult with SOL                | You do not have to seek additional information from the SME   |
| <b>(b) (5)</b>  |  |   |
|   |  |   |
| You are not sure whether an exemption applies to a responsive record (or portion of it) or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | Seek additional information from the SME | After considering the additional information, if you believe an exemption applies and foreseeable harm is present, you must consult with SOL  |
|   |  | After considering the additional information, if you believe an exemption does not apply and/or foreseeable harm is not present, you do not have to consult with SOL, although you can alert people that the record is going to be released |
| You believe an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)            | Seek additional information from the SME | You do not need to consult with SOL unless after considering the additional information provided by the SME changes your decision and you plan on withholding the record in full or in part   |

## B. What Type of Analysis is Needed?

As discussed above, if a FOIA exemption applies to a responsive record (or portion of it), you must also (b) (5) (see subsection III.B.1 below) or whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure (see subsections III.B.2 and 3, below).

### 1. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The FOIA explicitly notes that a foreseeable harm analysis is not necessary for them.
- Records that contain trade secrets and some confidential commercial and financial information are covered by *Exemption 4*. They are also protected by the Trade Secrets Act<sup>5</sup>, so a determination by an agency that a record (or portion of it) is protected by Exemption 4 is generally equivalent to a decision that it is protected by the Trade Secrets Act and is prohibited from disclosure by law. Therefore, a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 2. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>6</sup>, however, so Congress did not exclude them from a foreseeable harm

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<sup>5</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

<sup>6</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 3. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>7</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would interfere with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>8</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or unformed decisionmaking, and public confusion.<sup>9</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for

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<sup>7</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

<sup>8</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

<sup>9</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (as discussed further below in CHART 2) would harm an interest protected by Exemption 5.

legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative*—SEE CHART 2.

| <b>CHART 2</b>   |   |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Nature of the decision involved  | Is it highly sensitive and/or controversial   | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process   | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved   | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise        |
| Potential for process impairment   | Would there be an actual diminishment if employees felt inhibited by potential disclosure?    | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise |
| Significance of any process impairment                                       | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |

|  | <b>CHART 2<br/>(cont.)</b>  |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Age of the information in the record   | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                                    | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior



## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>May Protect this Type of Information</b>  | <b>Conduct</b>                         |
|-----------------------|--|--|
| Exemption 1           | Classified national defense and foreign policy information   | No foreseeable harm analysis           |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency  | Detailed foreseeable harm analysis     |
| Exemption 3           | Information protected from disclosure by another federal law   | No foreseeable harm analysis           |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential  | No foreseeable harm analysis           |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)   | Detailed foreseeable harm analysis     |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed   | Very concise foreseeable harm analysis |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose techniques, guidelines, or procedures for law enforcement investigations or prosecutions and disclosure of the techniques, guidelines, or procedures could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision  | Detailed foreseeable harm analysis     |
| Exemption 9           | Geological or geophysical information concerning wells   | Detailed foreseeable harm analysis     |

## Conversation Contents

Another draft!

Attachments:

/83. Another draft!/1.1 Foreseeable Harm 12.4.17...docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Dec 04 2017 10:41:44 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Another draft!  
**Attachments:** Foreseeable Harm 12.4.17...docx

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau and Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

### **I. Introduction**

This memorandum examines one aspect of the FOIA Improvement Act of 2016—foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult and/or coordinate with subject matter experts (SMEs) and/or the Office of the Solicitor (SOL).

### **II. Background**

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of the record), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of the record) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of the record), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of the record), but also to reasonably foresee that the disclosure of the record (or portion of the record) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm standard and made it statutory.

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of the record) is usually not the end of your analysis.<sup>3</sup>

### III. Analysis

#### A. When Do You Consult and/or Coordinate with SOL and/or the SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* either foreseeable harm would result from the record's release (b) (5)

If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Additionally, coordination with the SME (reaching out to the SME for his/her opinion) is sometimes a best practice (and/or bureau policy)—SEE CHART 1.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not have to consult with SOL (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or coordination is necessary.

- If you plan to withhold it because (b) (5) you believe foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) that is covered by an exemption because you believe no foreseeable harm would result from the disclosure *or* you don't know if you should release the record (or portion of it) because you are not sure if an exemption applies and/or foreseeable harm would result from the disclosure, *coordinate with the SME, (b) (5)*
- If you are not sure whether to release or withhold it because you don't know if an exemption applies or foreseeable harm would result, coordinate with the SME before taking further steps.

<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA. See [383 DM 15](#) § 15.5.H.

<sup>4</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

| <b>CHART 1</b>   |  |  |
|--|--|--|
| <b>If</b>  | <b>Then</b>  | <b>And</b>   |
| No FOIA exemption applies to any portion of a responsive record  | You cannot withhold it   | You do not have to conduct a foreseeable harm analysis or consult with SOL, although you can alert people that the record is going to be released  |
| If you believe an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                     | You must consult with SOL before withholding the record (or portion of it) | You do not have to coordinate with the SME   |
| If you are not sure whether an exemption applies to a responsive record (or portion of it) or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | Coordinate with the SME  | If you then believe an exemption applies and foreseeable harm is present, you must consult with SOL before withholding the record (or portion of it)   |
|  |  | If you then believe an exemption does not apply and/or foreseeable harm is not present, you do not have to consult with SOL, although you can alert people that the record is going to be released |
| If you believe an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)            | Coordinate with the SME before releasing the record                        | You do not need to consult with SOL unless the discussion with the SME changed your mind and you plan on withholding the record in full or in part   |

**(b) (5)**

*B. What Type of Analysis is Needed?*

As discussed above, if a FOIA exemption applies to a responsive record (or portion of the record), you must also **(b) (5)** (see subsection III.B.1 below) or whether it is reasonably foreseeable that harm to an interest

protected by the exemption would result from the disclosure (see subsections III.B.2 and 3, below).

### 1. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The FOIA explicitly notes that a foreseeable harm analysis is not necessary for them.
- Records that contain trade secrets and some confidential commercial and financial information are covered by *Exemption 4*. They are also protected by the Trade Secrets Act<sup>5</sup>, so a determination by an agency that a record (or portion of a record) is protected by Exemption 4 is generally equivalent to a decision that it is protected by the Trade Secrets Act and is prohibited from disclosure by law. Therefore, a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 2. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>6</sup>, however, so Congress did not exclude them from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption.

<sup>5</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

<sup>6</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 3. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>7</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Articulating a foreseeable harm for records covered by Exemption 2 makes sense under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would interfere with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>8</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or unformed decisionmaking, and public confusion.<sup>9</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipate of litigation)

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<sup>7</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

<sup>8</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

<sup>9</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (as discussed further below in CHART 2) would harm an interest protected by Exemption 5.



may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative*—SEE CHART 2.

| <b>CHART 2</b>   |   |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Nature of the decision involved  | Is it highly sensitive and/or controversial   | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process   | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved   | Will the same agency employees, or similarly situated ones, likely be affected by disclosure?               | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise                        |
| Potential for process impairment   | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise                 |
| Significance of any process impairment                                       | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record   | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the |

|   |   |   |
|---|---|---|
|   |   | deliberative process privilege will no longer apply   |
| Sensitivity of individual record portions | Can the sensitive materials be segregated from non-sensitive materials? | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>May Protect this Type of Information</b>  | <b>Conduct</b>                         |
|-----------------------|--|--|
| Exemption 1           | Classified national defense and foreign policy information   | No foreseeable harm analysis           |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency  | Detailed foreseeable harm analysis     |
| Exemption 3           | Information protected from disclosure by another federal law   | No foreseeable harm analysis           |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential  | No foreseeable harm analysis           |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)   | Detailed foreseeable harm analysis     |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed   | Very concise foreseeable harm analysis |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose techniques, guidelines, or procedures for law enforcement investigations or prosecutions and disclosure of the techniques, guidelines, or procedures could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision  | Detailed foreseeable harm analysis     |
| Exemption 9           | Geological or geophysical information concerning wells   | Detailed foreseeable harm analysis     |

## Conversation Contents

Next try for draft

**Attachments:**

/86. Next try for draft/1.1 Foreseeable Harm 12.4.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Dec 04 2017 09:39:37 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Next try for draft  
**Attachments:** Foreseeable Harm 12.4.17.docx

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau and Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

### **I. Introduction**

This memorandum examines one aspect of the FOIA Improvement Act of 2016—foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult and/or coordinate with subject matter experts (SMEs) and/or the Office of the Solicitor (SOL).

### **II. Background**

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of the record), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of the record) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of the record), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of the record), but also to reasonably foresee that the disclosure of the record (or portion of the record) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of the record) is usually not the end of your analysis.

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

### III. Analysis

#### A. When Do You Consult and/or Coordinate with SOL and/or the SME?

**(b) (5)**

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not have to consult with SOL (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or coordination is necessary.

- If you plan to withhold it because **(b) (5)** [REDACTED] or you believe foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) that is covered by an exemption because you believe no foreseeable harm would result from the disclosure or you don't know if you should release the record (or portion of it) because you are not sure if an exemption applies and/or foreseeable harm would result from the disclosure, *coordinate with the SME, (b) (5)* [REDACTED]
- If you are not sure whether to release or withhold it because you don't know if foreseeable harm would result, coordinate with the SME before taking further steps.

| CHART 1  |  |  |
|--|--|--|
| If   | Then   | And  |
| No FOIA exemption applies to any portion of a responsive record        | You cannot withhold it   | You do not have to conduct a foreseeable harm analysis or consult with SOL, although you can alert people that the record is going to be released  |
| A FOIA exemption may apply to a responsive record (or a portion of it) | You must also consider whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) <u>or</u> whether a foreseeable harm analysis is specifically not required | If you believe an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL before withholding the record (or portion of it), but you do not have to coordinate with the SME |

<sup>3</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

|  |                                       |   |
|--|---------------------------------------|---|
|  | because of the exemption that applies | <p>If you are not sure whether an exemption applies to a responsive record (or portion of it) or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), coordinate with the SME—after you coordinate with the SME:</p> <ul style="list-style-type: none"> <li>• if you believe an exemption applies and foreseeable harm is present, you must consult with SOL before withholding the record (or portion of it)</li> <li>• if you believe an exemption does not apply and/or foreseeable harm is not present, you do not have to consult with SOL, although you can alert people that the record is going to be released</li> </ul> <p>If you believe an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), coordinate with the SME before releasing the record—after you coordinate with the SME, you do not need to consult with SOL unless the discussion with the SME changed your mind and you plan on withholding the record in full or in part</p> <p>If you believe an exemption applies<br/> <b>(b) (5)</b><br/> you must consult with SOL before withholding the record (or portion of the it), but you do not have to coordinate with the SME</p> |
|--|---------------------------------------|---|

*B. What Type of Analysis is Needed?*



As discussed above, if a FOIA exemption applies to a responsive record (or portion of the record), you must also determine (b) (5) whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure (see subsections III.B.2 and 3, below).

### 1. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The FOIA explicitly notes that a foreseeable harm analysis is not necessary for them.
- Records that contain trade secrets and some confidential commercial and financial information are covered by *Exemption 4*. They are also protected by the Trade Secrets Act<sup>4</sup>, so a determination by an agency that a record (or portion of a record) is protected by Exemption 4 is generally equivalent to a decision that it is protected by the Trade Secrets Act and is prohibited from disclosure by law. Therefore, a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 2. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>5</sup>, however, so Congress did not exclude them from a foreseeable harm

<sup>4</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

<sup>5</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 3. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>6</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Articulating a foreseeable harm for records covered by Exemption 2 makes sense under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would interfere with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>7</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>8</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for

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<sup>6</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

<sup>7</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

<sup>8</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (as discussed further below in CHART 2) would harm an interest protected by Exemption 5.

legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative*—SEE CHART 2.

| <b>CHART 2</b>   |   |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Nature of the decision involved  | Is it highly sensitive and/or controversial   | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process   | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved   | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise        |
| Potential for process impairment   | Would there be an actual diminishment if employees felt inhibited by potential disclosure?    | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise |
| Significance of any process impairment                                       | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |

|   |   |   |
|---|---|---|
| Age of the information in the record      | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

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| Exemption 3           | Information protected from disclosure by another federal law   | No foreseeable harm analysis           |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential  | No foreseeable harm analysis           |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)   | Detailed foreseeable harm analysis     |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed   | Very concise foreseeable harm analysis |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose techniques, guidelines, or procedures for law enforcement investigations or prosecutions and disclosure of the techniques, guidelines, or procedures could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision  | Detailed foreseeable harm analysis     |
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# Conversation Contents

New foreseeable harm draft

Attachments:

/87. New foreseeable harm draft/1.1 Foreseeable Harm 11.30.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Dec 04 2017 08:02:19 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** New foreseeable harm draft  
**Attachments:** Foreseeable Harm 11.30.17.docx

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau and Office Freedom of Information Act (FOIA) Officers

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

### **I. Introduction**

This memorandum examines one aspect of the FOIA Improvement Act of 2016—foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to coordinate with subject matter experts (SMEs) and/or the Office of the Solicitor (SOL).

### **II. Background**

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the 2016 amendments to the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of the record), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of the record) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of the record), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of the record), but also to reasonably foresee that the disclosure of the record (or portion of the record) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of the record) is usually not the end of your analysis.

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.



### III. Analysis

#### A. When Do You Coordinate with SOL and/or the SME?

(b) (5)

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not have to coordinate with SOL (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more coordination is necessary.

- If you plan to withhold it because (b) (5) or you believe foreseeable harm would result from the release of the record, *you must coordinate with SOL*.
- If you plan to release a record (or portion of it) that is covered by an exemption because you believe no foreseeable harm would result from the disclosure *or* you don't know if you should release the record (or portion of it) because you are not sure if an exemption applies and/or foreseeable harm would result from the disclosure, *reach out to the SME for his/her opinion*, (b) (5).
- If you are not sure whether to release or withhold it because you don't know if foreseeable harm would result, coordinate with the SME before taking further steps.

| CHART 1  |  |  |
|--|--|--|
| If   | Then   | And  |
| No FOIA exemption applies to any portion of a responsive record      | You cannot withhold it   | You do not have to conduct a foreseeable harm analysis or coordinate with SOL, although you can alert people that the record is going to be released   |
| A FOIA exemption applies to a responsive record (or a portion of it) | You must consider whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) <u>or</u> whether a foreseeable harm analysis is specifically not | If you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must coordinate with SOL before withholding any portion of the record |
|  |  | If you are not sure whether you reasonably foresee harm to an interest protected by the exemption would  |

<sup>3</sup> See, e.g., [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

|  |  |  |
|--|--|--|
|  | required because of the exemption that applies | <p>result from the release of the record (or portion of it), coordinate with the SME—after you coordinate with the SME, you must coordinate with SOL before withholding any portion of the record</p> <p>If you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), coordinate with the SME before releasing the record—after you coordinate with the SME, you must coordinate with SOL only if the discussion with the SME changed your mind and you plan on withholding any portion of the record</p> <p>(b) (5) [REDACTED] you must coordinate with SOL before withholding any portion of the record</p> |
|--|--|--|

### *B. What Type of Analysis is Needed?*

As discussed above, if a FOIA exemption applies to a responsive record (or portion of the record), you must also determine (b) (5) [REDACTED] whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure (see subsections III.B.2 and 3, below).

#### 1. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*. The FOIA explicitly notes that a foreseeable harm analysis is not necessary for them.
- Records that contain trade secrets and some confidential commercial and financial information are covered by *Exemption 4*. They are also protected by the Trade Secrets

Act<sup>4</sup>, so a determination by an agency that a record (or portion of a record) is protected by Exemption 4 is generally equivalent to a decision that it is protected by the Trade Secrets Act and is prohibited from disclosure by law. Therefore, a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 2. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>5</sup>, however, so Congress did not exclude them from a foreseeable harm analysis in the FOIA Improvement Act. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 3. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into the exemption.<sup>6</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Articulating a foreseeable harm for records covered by Exemption 2 makes sense under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for

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<sup>4</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information, which would remove the disclosure prohibition of the Trade Secrets Act. Coordinate with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

<sup>5</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must coordinate with SOL accordingly.

<sup>6</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

particular vacant positions would interfere with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>7</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>8</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative*—SEE CHART 2.

| <b>CHART 2</b>                                   |                                 |                                   |
|--|---------------------------------|-----------------------------------|
| <b>Primary factors to consider if the record</b> | <b>Which leads to questions</b> | <b>Which leads to conclusions</b> |

<sup>7</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

<sup>8</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (given its age, content, and character, as discussed further below in CHART 2) would harm an interest protected by Exemption 5 (for example, confusion of the public or having a chilling effect on internal agency deliberations).

|   |   |   |
|---|---|---|
| <b>is protected by<br/>Exemption 5</b>    |   |   |
| Nature of the decision involved           | Is it highly sensitive and/or controversial   | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process      | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision                    | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved          | Will the same agency employees, or similarly situated ones, likely be affected by disclosure?               | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise  |
| Potential for process impairment          | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| Significance of any process impairment    | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record      | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information

covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

## Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>May Protect this Type of Information</b>  | <b>Conduct</b>                         |
|-----------------------|--|--|
| Exemption 1           | Classified national defense and foreign policy information   | No foreseeable harm analysis           |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency  | Detailed foreseeable harm analysis     |
| Exemption 3           | Information protected from disclosure by another federal law   | No foreseeable harm analysis           |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential  | No foreseeable harm analysis           |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)   | Detailed foreseeable harm analysis     |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed   | Very concise foreseeable harm analysis |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose techniques, guidelines, or procedures for law enforcement investigations or prosecutions and disclosure of the techniques, guidelines, or procedures could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision  | Detailed foreseeable harm analysis     |
| Exemption 9           | Geological or geophysical information concerning wells   | Detailed foreseeable harm analysis     |



# Conversation Contents

Per our discussion

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Nov 29 2017 07:24:34 GMT-0700 (MST)  
**To:** "Connors, Markee" <markee\_connors@ios.doi.gov>  
**Subject:** Per our discussion

Draft chart. Thanks.

Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>May Protect this Type of Information</b>  | <b>Conduct</b>                         |
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|             |   |                                    |
|-------------|---|------------------------------------|
|             | expected to risk circumvention of the law; or<br><br>(F) could reasonably be expected to endanger the life or physical safety of any individual |                                    |
| Exemption 8 | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision                 | Detailed foreseeable harm analysis |
| Exemption 9 | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis |

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior  
Direct: 202-208-5342 | Main: 202-208-3181

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Nov 29 2017 07:25:49 GMT-0700 (MST)  
**To:** Margaret Connors <margaret.connors@sol.doi.gov>  
**Subject:** Fwd: Per our discussion

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior  
Direct: 202-208-5342 | Main: 202-208-3181

----- Forwarded message -----  
**From:** **Cafaro, Cindy** <cindy\_cafaro@ios.doi.gov>  
**Date:** Wed, Nov 29, 2017 at 9:24 AM  
**Subject:** Per our discussion  
**To:** "Connors, Markee" <markee\_connors@ios.doi.gov>

Draft chart. Thanks.

Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>May Protect this Type of Information</b>  | <b>Conduct</b>                     |
|-----------------------|--|------------------------------------|
| Exemption 1           | Classified national defense and foreign policy information   | No foreseeable harm analysis       |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency  | Detailed foreseeable harm analysis |
| Exemption 3           | Information protected from disclosure by another federal law   | No foreseeable harm analysis       |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person and privileged or confidential  | No foreseeable harm analysis       |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege) | Detailed foreseeable harm analysis |

|             |   |  |
|-------------|---|--|
| Exemption 6 | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed  | Very concise foreseeable harm analysis |
| Exemption 7 | <p>Information compiled for law enforcement purposes, if disclosure:</p> <p>(A) could reasonably be expected to interfere with enforcement proceedings;</p> <p>(B) would deprive a person of a right to a fair trial or an impartial adjudication;</p> <p>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;</p> <p>(D) could reasonably be expected to disclose the identity of a confidential source;</p> <p>(E) would disclose techniques, guidelines, or procedures for law enforcement investigations or prosecutions and disclosure of the techniques, guidelines, or procedures could be reasonably expected to risk circumvention of the law; or</p> <p>(F) could reasonably be expected to endanger the life or physical safety of any individual</p> | Very concise foreseeable harm analysis |
| Exemption 8 | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision   | Detailed foreseeable harm analysis     |
| Exemption 9 | Geological or geophysical information concerning wells  | Detailed foreseeable harm analysis     |

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

Last foreseeable harm draft

**Attachments:**

/90. Last foreseeable harm draft/1.1 Foreseeable Harm 11.13.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Nov 22 2017 05:45:52 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Last foreseeable harm draft  
**Attachments:** Foreseeable Harm 11.13.17.docx

I'm planning to sign and send on Monday, FYI.  
Happy holidays.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau and Office FOIA Officers

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

### **I. Introduction**

This memorandum examines one aspect of the FOIA Improvement Act of 2016—foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to coordinate with subject matter experts (SMEs) and/or the Office of the Solicitor (SOL).

### **II. Background**

The FOIA generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available.<sup>1</sup> However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the 2016 amendments to the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of the record), the analysis was over and the record (or portion of the record) should be withheld. Other administrations adopted an additional policy requirement, requiring the agency seeking to withhold a responsive record to not only identify a FOIA exemption that applied to the record (or portion of the record), but also to *reasonably foresee* that the disclosure of the record (or portion of the record) would harm an interest protected by that exemption. The FOIA Improvement Act of 2016 generally adopted this formerly administrative requirement and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of the record) is usually not the end of your analysis.<sup>3</sup>

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<sup>1</sup> The FOIA also requires agencies to make certain records available to the public proactively (without a request having been received), but that is not the subject of this memorandum.

<sup>2</sup> See the attached Appendix for a general overview of FOIA's exemptions and related types of foreseeable harm analysis.

<sup>3</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (given its age, content,

### III. Analysis

#### A. When Do You Coordinate with SOL and/or the SME?

(b) (5)

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not have to coordinate with SOL (although you can alert people that the record is going to be released).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more coordination is necessary. If you plan to withhold it because (b) (5) you believe foreseeable harm would result from the release of the record, *you must coordinate with SOL.*<sup>5</sup> If you plan to release it because you believe no foreseeable harm would result from the disclosure *or* you don't know if you should release it because you are not sure if an exemption applies and/or foreseeable harm would result from the disclosure, *reach out to the SME for his/her opinion,* (b) (5)

| CHART 1  |  |  |
|--|--|--|
| If   | Then   | And  |
| No FOIA exemption applies to a responsive record                     | You cannot withhold it   | You do not have to conduct a foreseeable harm analysis or coordinate with SOL, although you can alert people that the record is going to be released   |
| A FOIA exemption applies to a responsive record (or a portion of it) | You must consider whether (1) you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) (b) (5) | If you believe (1) foreseeable harm would result from the release of the record (or portion of it) (b) (5) you must coordinate with SOL  |
|  |  | If you (1) do not believe (or are not sure whether) foreseeable harm would result from the release of the record (or portion of it) and (2) you believe a foreseeable harm analysis is required, you must coordinate with SOL, but coordinate with the SME first |

and character, as discussed further below) would harm an interest protected by Exemption 5 (for example, confusion of the public or having a chilling effect on internal agency deliberations).

<sup>4</sup> See 43 C.F.R. § 2.23(c).

(b) (5)

## B. What Type of Analysis is Needed?

As discussed above, if a FOIA exemption applies to a responsive record (or portion of the record), you must also determine (b) (5) whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure (see subsections III.B.2 and 3, below).

### 1. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

(b) (5) Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA (and therefore covered by *Exemption 3*) or 2) otherwise prohibited from disclosure by law.

Because it is against the law to disclose classified records (which are covered by *Exemption 1*) to an unauthorized person, records protected by *Exemption 1* are prohibited from disclosure by law and a foreseeable harm analysis is not necessary. Because records that contain trade secrets and some confidential commercial and financial information (records that are covered by *Exemption 4*) are also protected by the Trade Secrets Act, records protected by *Exemption 4* are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

### 2. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by certain FOIA exemptions (Exemptions 6, and 7), a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions, because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records created or compiled for law enforcement purposes (*Exemption 7*). Their disclosure is not always prohibited by law<sup>6</sup>, however, so Congress did not exclude them from a foreseeable harm analysis in the FOIA Improvement Act. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

<sup>6</sup> It is possible that records covered by *Exemption 6* and *7(C)* will be protected by the Privacy Act, but it will not always be the case. If they are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary.



### 3. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records protected by the remaining FOIA exemptions where a harm analysis is not already built into the exemption (Exemptions 2, 5, 8, and 9), a detailed foreseeable harm analysis is necessary.

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Articulating a foreseeable harm for records covered by Exemption 2 is often quite challenging, but may make sense under limited circumstances (for example, reoccurring interview questions).

*Exemption 5:* protects inter-agency or intra-agency materials<sup>7</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>8</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of record protected by Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment;

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<sup>7</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

<sup>8</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

significance of any process impairment; age of the information in the record; and sensitivity of individual record portions—SEE CHART 2.

|  | <b>CHART 2</b>  |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>   | <b>Which leads to conclusions</b>   |
| Nature of the decision involved  | Is it highly sensitive and/or controversial   | The less sensitive and/or controversial, the less likely foreseeable harm would arise   |
| Nature of the decisionmaking process   | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision   | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved   | Will the same agency employees, or similarly situated ones, likely be affected by disclosure?               | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise  |
| Potential for process impairment   | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| Significance of any process impairment                                       | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record   | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                                    | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.

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When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

ATTACHMENT

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Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

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## Conversation Contents

Foreseeable harm draft

**Attachments:**

/91. Foreseeable harm draft/1.1 Foreseeable Harm 11.13.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu Nov 16 2017 10:22:48 GMT-0700 (MST)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Foreseeable harm draft  
**Attachments:** Foreseeable Harm 11.13.17.docx

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Memorandum

To: Bureau and Office FOIA Officers

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm

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### III. Analysis

(b) (5)

(b) (5)

If a responsive record cannot be withheld under any of the nine FOIA exemptions, *you cannot withhold it* and you do not have to consult with SOL although you can alert people that the record is going to be released.

<sup>3</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (given its age, content, and character, as discussed further below) would harm an interest protected by Exemption 5 (for example, confusion of the public or having a chilling effect on internal agency deliberations).

(b) (5)

If you plan to withhold a responsive record (or a portion of it) because an exemption applies and either foreseeable harm would result from the release of the record (see below) (b) (5) you must consult with SOL as required by [43 C.F.R. section 2.23\(c\)](#).

If you plan to release all of a responsive record because no exemption applies, no foreseeable harm analysis is required and you do not have to consult with SOL. If you plan to release a responsive record (or a portion of it) because an exemption applies, but you believe no foreseeable harm would result from the disclosure (or you are not sure if foreseeable harm would result from the disclosure and therefore don't know if you should release the responsive record), reach out to the SME for their opinion on whether they believe foreseeable harm would result from the disclosure, (b) (5) SEE CHART 1.

| CHART 1  |  |  |
|--|--|--|
| If   | Then   | And  |
| No FOIA exemption applies to a responsive record                     | You cannot withhold it   | You do not have to conduct a foreseeable harm analysis or consult with SOL, although you can alert people that the record is going to be released  |
| A FOIA exemption applies to a responsive record (or a portion of it) | You must consider whether (1) you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) (b) (5) | If you believe (1) foreseeable harm would result from the release of the record (or portion of it) (b) (5) you must consult with SOL <sup>4</sup>  |
|  | (b) (5)  | If you (1) do not believe (or are not sure whether) foreseeable harm would result from the release of the record (or portion of it) and (2) you believe a foreseeable harm analysis is required, you must consult with SOL, but consult with the SME first |

A. No Foreseeable Harm Analysis (Exemption 1, 3, and 4)

(b) (5)

Under the FOIA Improvement Act, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a

(b) (5)



statute other than the FOIA (and therefore covered by *Exemption 3*) or 2) otherwise prohibited from disclosure by law.

Because it is against the law to disclose classified records (which are covered by *Exemption 1*) to an unauthorized person, records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary. Because records that contain trade secrets and some confidential commercial and financial information (records that are covered by *Exemption 4*) are also protected by the Trade Secrets Act, records protected by Exemption 4 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### B. Very Concise Foreseeable Harm Analysis (Exemptions 6 and 7)

For records covered by certain FOIA exemptions (Exemptions 6, and 7), a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions, because of what they protect: personal privacy (*Exemption 6 and 7(C)*) and records created or compiled for law enforcement purposes (*Exemption 7*). Their disclosure is not always prohibited by law<sup>5</sup>, however, so Congress did not exclude them from a foreseeable harm analysis in the FOIA Improvement Act. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward (b) (5)

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### C. Detailed Foreseeable Harm Analysis (Exemptions 2, 5, 8, and 9)

For records protected by the remaining FOIA exemptions where a harm analysis is not already built into the exemption (Exemptions 2, 5, 8, and 9), a detailed foreseeable harm analysis is necessary.

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Articulating a foreseeable harm for records covered by Exemption 2 is often quite challenging, but may make sense under limited circumstances (for example, reoccurring interview questions).

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<sup>5</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, but it will not always be the case. If they are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary.

*Exemption 5*: protects inter-agency or intra-agency materials<sup>6</sup> that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>7</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

Note, however, that if these harms would not be present (for example, a draft document that varies from a final, released version in only a few typographical particulars or decades old litigation notes from a long-resolved case), generally no foreseeable harm would result from the release and the record must be disclosed.

When considering whether foreseeable harm would arise from the release of record protected by Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions—SEE CHART 2.

|  | <b>CHART 2</b>                              |   |
|--|---|---|
| <b>Primary factors to consider if the record is protected by Exemption 5</b> | <b>Which leads to questions</b>             | <b>Which leads to conclusions</b>   |
| Nature of the decision involved  | Is it highly sensitive and/or controversial | The less sensitive and/or controversial, the less likely foreseeable harm would arise |

<sup>6</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001)

<sup>7</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9. For more information on the level of detail your foreseeable harm analysis for records protected under the deliberative process privilege will require, see this guidance.

|   |   |   |
|---|---|---|
| Nature of the decisionmaking process      | Does it require total candor and confidentiality?   | The less candor and confidentiality required, the less likely foreseeable harm would arise  |
| Status of the decision                    | Has the decision been made yet?   | If the decision has been made, it is less likely foreseeable harm would arise   |
| Status of the personnel involved          | Will the same agency employees, or similarly situated ones, likely be affected by disclosure?               | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise  |
| Potential for process impairment          | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise   |
| Significance of any process impairment    | How strong would the chilling effect be?  | If the chilling effect would be weak, it is less likely foreseeable harm would arise  |
| Age of the information in the record      | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials   |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to determine whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

# Conversation Contents

## FOIA forum notes

### Attachments:

/92. FOIA forum notes/1.1 Quarterly FOIA Forum 8-31-17.docx  
/92. FOIA forum notes/4.1 Quarterly FOIA Forum 8-31-17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue Nov 14 2017 09:59:36 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** FOIA forum notes  
**Attachments:** Quarterly FOIA Forum 8-31-17.docx

Thanks again to everyone who attended the last quarterly forum (and to everyone who tried to attend--we hope to have more phone lines available someday).  
As promised, here are our meeting notes.

Thanks also for all your hard work to get all the updates for FY17 entries finished by COB today. We're almost there!

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Department of the Interior Quarterly FOIA Forum (8.31.17)

**Forum began at 2:02 DC local time**

- **Opening Remarks**

- There was an announcement to all attending that this forum would have notes taken which would be subsequently compiled and distributed as minutes.

- **Questions from Attendees**

- *Can a casefile that has pending law enforcement concerns be withheld in full under Exemption 7(A) without an actual review?*
  - No, an actual review for Exemption 7(A) applicability is required.
  - However, when invoking Exemption 7(A), you may justify withholdings by reference to generic categories of records (for example, witness statements).
    - When electing to use this “generic” or “categorical” approach, you must: 1) define categories functionally, 2) conduct a record-by-record review in order to assign the records to the proper category; and 3) consider how the release of each category would interfere with enforcement proceedings and therefore cause foreseeable harm.
    - Working with the subject matter experts (like law enforcement officers) will help.
- *Does EFTS allow for uploading of “installment” or rolling responses into the system?*
  - Yes. The “Response/Close” tab includes a section to note partial releases have been made, and the details of the partial release.
- *Should I rely on FISSA training slides when making FOIA determinations, for example, by using their definition of PII to make Exemption 6 determinations?*
  - No. The FISSA training is general training (and PII and Exemption 6 are not identical). If you have FOIA questions, do not hesitate to reach out.
- *What format should bureaus use when sending letters and responses to requesters?*
  - The appropriate person should send the communication promptly, in writing, and using the appropriate language. Responses should also be in the form the requester prefers (e.g., via email) when possible. You need to maintain FOIA files appropriately under the Federal Records Act. Beyond that, bureau policy prevails.
  - Some bureaus send letters in the bodies of emails, others attach letters (on formal letterhead and with electronic signatures) to emails. Some bureaus send signed, hard-copy letters, including CDs containing the records when the electronic files would be too large to send electronically, others compress large electronic files in Adobe and therefore can almost always send records electronically.
  - There was a discussion of records being sent without metadata after the redaction process (which can make the records “clean PDFs” but can also raise Section 508 issues).

- **Announcements/Reminders**

- Exemption 5's deliberative process privilege can sometimes protect what appears to be "final" records. For example, a subordinate's final suggestion or report to his or her superior may be predecisional, if the superior will be making the final decision, rather than the subordinate. Consider if the report is indeed "final" and "post decisional." In other words, has a *decision* been made, or a *recommendation*? If it is a recommendation, then the "final" record could be predecisional (for example, if a bureau director makes a final recommendation to the Secretary).
- Compared DOI FOIA statistics for FY16 and FY17 for the department as a whole and the bureaus (particularly for number of requests received and processed).
- Discussed the difference between "near duplicates" (which need to be produced when responsive) and "exact duplicates" (which generally do not).
  - An example of a near duplicate is a draft which is different from the final version by only a few commas. Although the draft is almost the same as the final report, it's not an exact duplicate. Therefore, if it is responsive to the request, you need to process it.
  - An example of an exact duplicate is an attachment that an employee, John, emailed to ten people. It would be fine to process/provide one copy of the attachment because the other 9 copies are exact duplicates. As for the ten emails that John sent, ask people to search and provide them (assuming, of course, that the request is not just asking for John's communications on this matter and that the email's recipients would otherwise be part of the reasonable search process). The reason for this is while John's version has everything he sent, it may not include the follow ups the recipients may have created. (For example, after John sends the email to ten people, including Sue, Sue forwards the email, with commentary, to Alex and Jim, who go on to have a lively discussion with her about it.) If the emails that are sent back to you are truly identical (for example, 9 people simply received John's email and never did anything with it), you can remove the duplicates from the processing stack. If it is too time consuming and difficult to deduplicate the messages, you can process all the received copies.
    - When there are exact duplicates that you don't process, you should *explicitly tell the requester* in your response letter that there were exact duplicates of some of the responsive records and you didn't process them.
      - This non-processing of duplicates will save time for everyone (and possibly money for the requester).
      - If the requester asks us to process the exact duplicates, however, you will need to do so.
  - If you find a personal email addresses via an Internet search, do not assume the email address is publicly available for Exemption 6 purposes. Make sure the email address is not simply being returned because you already have the exact address. (Some email address will show up in an Internet search if you have the



exact address, even if they are otherwise behind a barrier, like a password protected website.)

- If you want to invoke Exemption 6 for materials found in email signature blocks (including cell phone numbers in email signature blocks), please contact your Bureau FOIA Officer to discuss why you believe an expectation of privacy still exists for the material, despite the material being distributed every time an email is sent by that person. Generally, this will be difficult to show.
- The Privacy Act does not prevent requester from getting their own material under FOIA. If the Privacy Act applies to a record, however, you cannot make a discretionary release of that record under the FOIA.
- Don't delay communications with requesters by sending communications via physical (snail) mail unless the requester prefers that you do so (you will know they prefer this if they only give you a physical address to contact them or if they specifically ask you to send communications to them in hard copy).
- Before closing out a request by saying the requested materials are available in an online FOIA library, check the library first to make sure that is actually the case, for each part of the request. (Just because some materials in the library are on the same general subject does not mean that is the end of the analysis or that directing the requester there will fulfill your reasonable search obligations.) Also, you should specifically direct the requester to where the responsive material is in the library, if it will not immediately be obvious.
- The search cutoff date is either the scope specified in the request or, if the request is open ended, the date that the actual search for responsive records begins. If different record custodians start at a different time, check to see if they began within a reasonable span of time of each other. If they did not, the outlier's search parameters will be different than the other searchers'. You can let searchers know that their non-timely response can jeopardize their search end points.

**Forum adjourned at 2:59 DC local time**

# Conversation Contents

Pencils down for FY17 EFTS entries

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon Nov 13 2017 07:34:00 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Pencils down for FY17 EFTS entries

Hello, everyone. Most of you have already heard from your bureau FOIA Officer that the deadline for completing EFTS data updates for FY17 activities is drawing near. This message is to let you know that a final grace period for completing these updates will come to a close *on Tuesday (November 14th)*.

If you have any corrections to make to your FY17 EFTS data, please make them (and contact your FOIA Officer, so they will not be surprised by the change and can contact me as needed) before COB Tuesday. FYI, any changes made after COB Tuesday will be reflected in the FY18 report to DOJ. If you have any questions, please let me know.

Thank you again for working to ensure our EFTS entries are timely, accurate, and consistent.

Best wishes for a wonderful Thanksgiving.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior  
Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

## Guidance on tracking and assessing search and review fees

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Feb 15 2017 11:37:24 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>, "Nguyen, Diem" <diem\_d\_nguyen@ios.doi.gov>  
**Subject:** Guidance on tracking and assessing search and review fees

Hello, everyone. Questions have arisen about tracking and assessing search and review fees. Carefully keeping track of your search and review time ensures you do not over- (or under-) estimate the time spent searching and reviewing for a particular request. It may also assist you later if the requester appeals or sues.

Sections 2.41 and 2.43 of our FOIA regulations (located [here](#)--please take a look to make sure you have the newest version, as our recent amendments to the regulations went into effect last month--an item-by-item list of the changes is available [here](#)) specifically address the search and review fees a requester is required to pay. The regulations note these fees are charged by the quarter hour.

If you are doing a FOIA search or review, keep careful track of how long you have searched and/or reviewed. Do not round your time up or down when you report it to the office that will be making the final decision on the request and responding to the requester (the [Action Office](#)).

This is a good way to keep track of your time (please note that the entries are precise and broken out by day):

*Request 2017-00001*

- 4/11/17--17 minute search and 25 minute review
- 4/12/17--20 minute search and 31 minute review

This is not as good (please note the entry has total amounts, rather than being broken out by day):

- Request 2017-00001--37 minutes searching and 56 minutes reviewing

You will report your time spent searching/reviewing to the Action Office. The Action Office will add up the time all of the searchers/reviewers have spent on the request. The Action Office will then charge search and/or review time (when appropriate) for any full 15-minute increments (and enter that time in the EFTS).

For example, if three [Professional](#) people searched and one searched 16 minutes, a second searched 31 minutes, and a third searched 10 minutes, that adds up to 57 total minutes searched. The Action Office will charge for (and put in the EFTS) the three complete 15-minute increments, for a total of 45 minutes of Professional search time. The Action Office should not charge for the additional 12 minutes that make up a partial 15-minute increment (or enter that extra time in the EFTS).

Thank you for your attention to this matter. Fee issues can be complex. If you have any questions, please feel free to let me know.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## Conversation Contents

Next draft

Attachments:

/100. Next draft/1.1 Foreseeable Harm 10.3.17.docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue Oct 03 2017 13:25:45 GMT-0600 (MDT)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Next draft  
**Attachments:** Foreseeable Harm 10.3.17.docx

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

This memorandum examines one aspect of the FOIA Improvement Act of 2016 (the Act)—foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with subject matter experts (SMEs) and/or the Office of the Solicitor (SOL).

## **I. Background**

The FOIA gives any person the right to request federal agency records and requires agencies to make records responsive to requests promptly available.<sup>1</sup> However, the FOIA also included nine exemptions to the general rule of mandatory disclosure. Before the Act, some administrations held that if one or more of the nine FOIA exemptions applied to a record, the analysis was over and the record should be withheld. Other administrations adopted an additional policy requirement, known as the foreseeable harm requirement, requiring both that an exemption apply and that foreseeable harm would follow from the records release before a record could be withheld. The Act adopted this additional requirement and made it statutory (and thereby enforceable in court). Therefore, under the Act, a FOIA exemption applying to the responsive agency record is not the end of your legal analysis.

Before you can withhold a responsive agency record that is covered by a statutory exemption, you must also reasonably foresee that disclosure would harm an interest protected by the exemption you plan to invoke as applying to the agency record (or the portion of the record you plan to withhold).<sup>2</sup>

## **II. What If None of FOIA's Nine Exemptions Apply to a Responsive Agency Record?**

If the responsive agency record cannot be withheld under any of the nine FOIA exemptions, *you cannot withhold it and you do not have to consult with SOL* although you can alert people that the record is going to be released.

## **III. What If One or More of FOIA's Nine Exemptions Apply to a Responsive Agency Record?**

**(b) (5)**

<sup>2</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (given its age, content, and character) would harm an interest protected by Exemption 5 (for example, confusion of the public or having a chilling effect on internal agency deliberations).

If an exemption applies, you must then determine whether foreseeable harm would result from the disclosure. (Two types of foreseeable harm analysis are discussed below.)

After your foreseeable harm analysis is complete, if you plan to withhold a responsive record (or portions of it) because an exemption applies and foreseeable harm does too, *you must consult with SOL as required by [43 C.F.R. section 2.23\(c\)](#).*

On the other hand, if an exemption applies, but you believe no foreseeable harm would result from the disclosure and the record should therefore be released (or you are not sure if foreseeable harm would result from the disclosure), *reach out to the SME for their opinion on whether they believe foreseeable harm would result*

(b) (5)

#### A. Concise Foreseeable Harm Analysis

(b) (5)

This is because a harm analysis is built into these exemptions, because of what they protect: classified records (Exemption 1), records protected by another statute (Exemption 3), trade secrets and some confidential commercial and financial information (Exemption 4), personal privacy (Exemption 6 and 7(C)), and records created or compiled for law enforcement purposes (Exemption 7).

When reviewing records to determine whether these exemptions (1, 3, 4, 6, and 7) apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information from such documents in order to make a partial disclosure, if possible.

#### B. Longer Foreseeable Harm Analysis

For records protected by the remaining exemptions (Exemptions 2, 5, 8, and 9), a longer foreseeable harm analysis is necessary. This is because a harm analysis is not already built into the exemption.<sup>3</sup> For these records, the age of the record, the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a release is required because no foreseeable harm exists.

- Exemption 2 protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Articulating a

<sup>3</sup> This is why, since 2009 (when the foreseeable harm test was still a policy, rather than legal, requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

(b) (5)

foreseeable harm for these records may be quite challenging, but may make sense under limited circumstances (e.g., reoccurring interview questions).

- Exemption 5 protects inter-agency or intra-agency materials that would normally be privileged in civil discovery, such as the deliberative process privilege (which protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).
  - The foreseeable harm arising from the release of materials covered by the deliberative process privilege (e.g., drafts) may be: injury to the decision making process, a chilling effect on discussion, hasty or uninformed decision making, and public confusion.<sup>4</sup>
  - The foreseeable harm arising from the release of materials covered by the attorney-client privilege (e.g., confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
  - The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (e.g., attorney notes made in reasonable anticipate of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.
  - If these harms would not be present (e.g., for a draft document whose final version has been released and that varies from that final version in only a few typographical particulars or decades old litigation notes from a case long resolved), generally no foreseeable harm would result from the release and the record may be disclosed.
- Exemption 8 protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.
- Exemption 9 protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from release could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though not always the case, that foreseeable harm could also be that the release of the data would place one party at a disadvantage in the negotiations over the use of the contents of the well (such as water).

#### IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or me.

(b) (5)



# Conversation Contents

Draft

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue Oct 03 2017 09:28:04 GMT-0600 (MDT)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Draft

If an exemption applies, you must determine whether foreseeable harm also applies. (Two types of foreseeable harm analysis are discussed below.)

After your foreseeable harm analysis is complete, if you plan to withhold a responsive record (or portions of it) because an exemption applies and foreseeable harm does too, *you must consult with SOL as required by [43 C.F.R. section 2.23\(c\)](#).*

On the other hand, if an exemption applies, but you believe there would be no foreseeable harm in the disclosure and the record should therefore be released (or you are not sure if foreseeable harm would result from the disclosure), *reach out to the SME for their opinion on whether they believe foreseeable harm would result.* (b) (5)

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

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# Conversation Contents

**DRAFT on Drafts and foreseeable harm**

**Attachments:**

/102. DRAFT on Drafts and foreseeable harm/1.1 Foreseeable Harm 9.29.17..docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Sep 29 2017 13:21:31 GMT-0600 (MDT)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** DRAFT on Drafts and foreseeable harm  
**Attachments:** Foreseeable Harm 9.29.17..docx

Per our discussion

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

## **I. Background**

This [email/memorandum] examines one aspect of the FOIA Improvement Act of 2016 (the Act)--foreseeable harm. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with subject matter experts (SMEs) and/or the Office of the Solicitor (SOL).

Under the Act, a FOIA exemption applying to the responsive agency record is not the end of your legal analysis. Before you can withhold a responsive agency record that is covered by a statutory exemption, you must also reasonably foresee that disclosure would harm an interest protected by the exemption applying to the agency record.

For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would apply. However, before you can properly withhold a particular draft under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (given its age, content, and character) would harm an interest protected by Exemption 5 (for example, confusion of the public or having a chilling effect on internal agency deliberations).

## **II. What If None of FOIA's Nine Exemptions Apply to a Responsive Agency Record?**

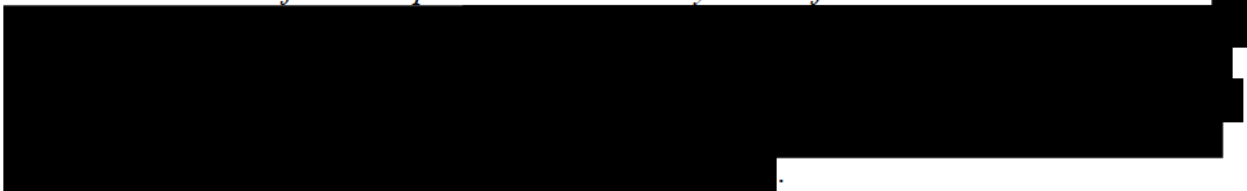
If the responsive agency record cannot be withheld under any of the nine FOIA exemptions, *you cannot withhold it and you do not have to consult with SOL* although you can alert people that the record is going to be released.

## **III. What If One or More of FOIA's Nine Exemptions Apply to a Responsive Agency Record?**

If an exemption applies, you must determine whether foreseeable harm also applies. (Two types of foreseeable harm analysis are discussed below.)

After your foreseeable harm analysis is complete, if you plan to withhold a responsive record (or portions of it) because an exemption applies and foreseeable harm does too, *you must consult with SOL as required by [43 C.F.R. section 2.23\(c\)](#).*

On the other hand, if an exemption applies, but you believe foreseeable harm does not and the record should therefore be released (or you are not sure if foreseeable harm applies), *you should reach out to the SME for their opinion on whether they believe foreseeable harm would result.* (b) (5)



#### A. Concise Foreseeable Harm Analysis

(b) (5)

This is because a harm analysis is essentially already built into the exemption, because of what they protect: classified records (Exemption 1), records protected by another statute (Exemption 3), trade secrets and some confidential commercial and financial information (Exemption 4), personal privacy (Exemption 6 and 7(C)), and records created or compiled for law enforcement purposes (Exemption 7).

When reviewing records to determine whether these exemptions (1, 3, 4, 6, and 7) apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information from such documents in order to make a partial disclosure, if possible.

#### B. Longer Foreseeable Harm Analysis

For records protected by the remaining exemptions (Exemptions 2, 5, 8, and 9), a longer foreseeable harm analysis is necessary. This is because a harm analysis is not already built into the exemption. For these records, the age of the record, the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a release is required because no foreseeable harm exists.

- Exemption 2 protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keep to itself for its own use that only relate to issues of employee relations and human resources). Articulating a foreseeable harm for these records may be quite challenging.
- Exemption 5 protects inter-agency or intra-agency materials that would normally be privileged in civil discovery, such as the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege.
  - The foreseeable harm arising from the release of materials covered by the deliberative process privilege (e.g., drafts) may be: injury to the decision making process, a chilling effect on discussion, hasty or uninformed decision making, and public confusion.
  - The foreseeable harm arising from the release of materials covered by the attorney-client privilege (e.g., confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
  - The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (e.g., attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.
  - If these harms would not be present (e.g., for a draft document whose final version has been released and that varies from that final version in only a few

typographical particulars or decades old litigation notes from a case long resolved), no foreseeable harm would arise from the release and the record may be disclosed.

- Exemption 8 protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department.
- Exemption 9 protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from release could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though not always the case, that foreseeable harm could also be that the release of the data would place one party at a disadvantage in the negotiations over the use of the contents of the well (such as water).

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer and/or me.

# Conversation Contents

## DOJ Announces its First Slate of FY 2018 Training Dates

**"Cafaro, Cindy"** <cindy\_cafaro@ios.doi.gov>

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu Sep 21 2017 05:30:58 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** DOJ Announces its First Slate of FY 2018 Training Dates

Good morning, everyone. Please note that DOJ has just published its first slate of FOIA training opportunities for FY18. Information on the courses is here:

<https://www.justice.gov/oip/blog/first-slate-foia-training-fiscal-year-2018-now-available>

This is good, free training and it fills up quickly. You may wish to take advantage of it.

Thanks.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

## Next FOIA forum

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Aug 16 2017 07:42:08 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Next FOIA forum

Hello, everyone. Our next quarterly FOIA open forum will be held tomorrow, on August 17th, from 2 PM to 3 PM (ET).

As you know, the forums are very well attended and use all of our available phone lines (while leaving some people unable to join the call). Therefore, *people in and around the District of Columbia are strongly encouraged to attend in person* in room 5056 of the MIB. People from outside the D.C. area are strongly encouraged to meet in groups to call in together. (This will help us include as many people as possible.)

The dial-in numbers for the meeting are as follows:

Telecon line:

(b) (5)

Participant code: (b) (5)

We will again be distributing a written summary of the meeting.

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Aug 25 2017 13:37:59 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Re: Next FOIA forum

Hello, everyone. It turns out our technical issues were caused by the noble effort of BSEE to provide us with more phone lines. We are going to go back to our previous technological platform and have rescheduled the quarterly FOIA open forum for August 31, from 2 PM to 3 PM (ET).

As you know, the forums are very well attended and use all of our available phone lines (while leaving some people unable to join the call). Therefore, *people in and around the District of Columbia are strongly encouraged to attend in person* in room 5056 of the MIB. People from outside the D.C. area are strongly encouraged to meet in groups to call in together. (This will help us include as many people as possible.)

The dial-in numbers for the meeting are as follows:

(b) (5) (Herndon Gateway) or  
(b) (5) (Denver Gateway)

When prompted for a number, enter (b) (5)

Thanks again.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Thu, Aug 17, 2017 at 2:14 PM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

Hello, everyone. I am sorry to say that our (wonderful and much appreciated) BSEE hosts had technical issues today that could not be resolved.

We will work to reschedule the FOIA forum for as soon as possible (hopefully it will be next week).

I am very sorry for the inconvenience.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Wed, Aug 16, 2017 at 9:42 AM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

Hello, everyone. Our next quarterly FOIA open forum will be held tomorrow, on August 17th, from 2 PM to 3 PM (ET).

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# Conversation Contents

## Communicating with the Office of Government Information Services (OGIS)

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Aug 25 2017 13:13:49 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Communicating with the Office of Government Information Services (OGIS)

Hello, everyone. As your Bureau FOIA Officer may have mentioned to you, in November 2016, we established a protocol coordinating NARA's Office of Government Information Services (OGIS) communications with Interior bureaus and offices to ensure Interior provides OGIS with timely, accurate, and consistent responses.

Under this protocol, my office and the Department's FOIA & Privacy Act Appeals Office serve as the Department's contacts with OGIS; OGIS contacts my office if it needs any information about FOIA requests and the FOIA & Privacy Act Appeals Office if it needs any information about FOIA appeals. This protocol allows us to avoid confusion, mixed messages, duplication of effort, and inconsistent responses.

If you are ever directly contacted by an OGIS employee about a FOIA request or a FOIA appeal, an error has occurred. Immediately redirect the OGIS employee to me (at 202-208-5342) or the FOIA & Privacy Act Appeals Office (at 202-208-5339), as appropriate.

***In short: if you are contacted by an OGIS employee, immediately redirect him or her to me or the FOIA & Privacy Act Appeals Office.***

Thank you. If you have any questions, please do not hesitate to let me know.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

## FOIA forum notes

### Attachments:

/108. FOIA forum notes/1.1 Quarterly FOIA Forum 5-18-17..docx  
/108. FOIA forum notes/13.1 Quarterly FOIA Forum 5-18-17..docx  
/108. FOIA forum notes/15.1 Quarterly FOIA Forum 5-18-17..docx  
/108. FOIA forum notes/18.1 Quarterly FOIA Forum 5-18-17..docx

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed May 24 2017 13:30:59 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** FOIA forum notes  
**Attachments:** Quarterly FOIA Forum 5-18-17..docx

Thanks again to everyone who attended the forum last week (and to everyone who tried to attend--we still hope to have more phone lines available someday).

As promised, here are our meeting notes.

Please note that one of the items mentioned in the notes is free, online Section 508 training that will take place tomorrow.

Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

**"Hanson, Sonja" <sonja\_hanson@nps.gov>**

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**From:** "Hanson, Sonja" <sonja\_hanson@nps.gov>  
**Sent:** Thu May 25 2017 09:42:47 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov, "Gill, Liz" <liz\_gill@partner.nps.gov>  
**Subject:** Fwd: FOIA forum notes  
**Attachments:** Quarterly FOIA Forum 5-18-17..docx

Cindy,  
Would you please add Liz Gill and myself to your distribution list?  
Thank you,  
Sonja

Sonja L. Hanson, APR  
Acting Director of Communications & External Affairs  
[Golden Gate National Recreation Area](#)  
Desk (415) 561-4730

OS-2018-00959-000452

Cell (415) 786-8021

[<font>sonja\\_hanson@nps.gov](mailto:sonja_hanson@nps.gov)



#FindYourPark

----- Forwarded message -----

From: **Anzelmo-Sarles, Jenny** <[jenny\\_anzelmo-sarles@nps.gov](mailto:jenny_anzelmo-sarles@nps.gov)>

Date: Thu, May 25, 2017 at 7:38 AM

Subject: Fwd: FOIA forum notes

To: Liz Gill <[liz\\_gill@partner.nps.gov](mailto:liz_gill@partner.nps.gov)>, Sonja Hanson <[sonja\\_hanson@nps.gov](mailto:sonja_hanson@nps.gov)>

FYSA. not sure if you're had a chance to get added to Cindy's list.

---

Jenny Anzelmo-Sarles  
Spokesperson  
National Park Service  
National Capital Region

Office: (202) 619-7177  
Cell: (307) 690-2355



The National Park Service cares for special places saved by the American people so that all may experience our heritage.

EXPERIENCE YOUR AMERICA ®

----- Forwarded message -----

From: **Cafaro, Cindy** <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>

Date: Wed, May 24, 2017 at 3:30 PM

Subject: FOIA forum notes

To: Robert Howarth <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)>

Thanks again to everyone who attended the forum last week (and to everyone who tried to attend--we still hope to have more phone lines available someday).

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**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu May 25 2017 09:51:34 GMT-0600 (MDT)  
**To:** Bharati Uppin <bharati\_uppin@ios.doi.gov>  
**Subject:** Fwd: FOIA forum notes  
**Attachments:** Quarterly FOIA Forum 5-18-17..docx

Hi, Bharati. Two to add to the cat list, please.  
Thanks.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

----- Forwarded message -----

From: **Hanson, Sonja** <[sonja\\_hanson@nps.gov](mailto:sonja_hanson@nps.gov)>  
Date: Thu, May 25, 2017 at 11:42 AM  
Subject: Fwd: FOIA forum notes  
To: [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov), "Gill, Liz" <[liz\\_gill@partner.nps.gov](mailto:liz_gill@partner.nps.gov)>

Cindy,  
Would you please add Liz Gill and myself to your distribution list?  
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Sonja

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Date: Thu, May 25, 2017 at 7:38 AM  
Subject: Fwd: FOIA forum notes  
To: Liz Gill <[liz\\_gill@partner.nps.gov](mailto:liz_gill@partner.nps.gov)>, Sonja Hanson <[sonja\\_hanson@nps.gov](mailto:sonja_hanson@nps.gov)>

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The National Park Service cares for special places saved by the American people so that all may experience our heritage.

OS-2018-00959-000454

----- Forwarded message -----

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Date: Wed, May 24, 2017 at 3:30 PM  
Subject: FOIA forum notes  
To: Robert Howarth <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)>

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Direct: 202-208-5342 | Main: 202-208-3181

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**"Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>**

**From:** "Cafaro, Cindy" <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
**Sent:** Tue May 30 2017 10:04:40 GMT-0600 (MDT)  
**To:** Silvia Hart <[shart@blm.gov](mailto:shart@blm.gov)>  
**Subject:** Fwd: FOIA forum notes  
**Attachments:** Quarterly FOIA Forum 5-18-17..docx

Per your request. Thanks.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

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From: **Cafaro, Cindy** <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)>  
Date: Wed, May 24, 2017 at 3:30 PM  
Subject: FOIA forum notes  
To: Robert Howarth <[robert\\_howarth@ios.doi.gov](mailto:robert_howarth@ios.doi.gov)>

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Direct: 202-208-5342 | Main: 202-208-3181

## Department of the Interior Quarterly FOIA Forum (5/18/17)

- **Forum began at 2:01 DC local time**

- **Questions from Attendees and Resulting Discussions:**

1. *When will the next DOJ OIP FOIA training be announced?*

An announcement of DOJ OIP FOIA training is sent out to the DOI FOIA email contact list as soon as the Departmental FOIA Officer is notified of upcoming training dates. It was noted that this training is good and free, but it is usually only in D.C. and they fill up rather quickly. The training dates are also available at: <https://www.justice.gov/oip/training>

2. *Is FOIA training available on WebEx?*

Some FOIA training sessions are streamed over the Internet. Additionally, DOI Learn hosts two sets of DOJ OIP training (one for FOIA professionals, one for people seeking a less-detailed understanding of the FOIA). Furthermore, the Department will have a *free Section 508 Awareness Event on 5/25/17 that will be livestreamed* at <https://www.doi.gov/events>. (A Department-wide email was sent out with more details about this training on May 18<sup>th</sup>.) There was also discussion about American Society of Access Professionals (ASAP) training that is provided online. It was noted that ASAP training has not been endorsed by DOJ or DOI. Finally there was discussion regarding Section 508 compliance for federal government websites. A general reminder that records posted online are required to be Section-508 compliant and that electronic records are required to be Section 508 compliant at the time of their creation was made, along with noting that a Section 508 disclaimer should be sought from the Section 508 Program Managers if posting records that are not compliant with Section 508.

3. *Is it appropriate to seek pre-payment for a request when the fee estimate is \$25,000?*

[Section 2.50](#) of the regulations expressly deals with pre-payment issues. The estimated amount of the fee is not enough, without meeting other factors, to require prepayment. Also, consideration should be given to the timing of making determinations, as taking too long to make a determination can prevent DOI from charging certain fees (see [Section 2.37\(f\)](#) of the regulations). It was noted that if you know you will not be able to make a determination in a timely way, don't ask for an advance payment including fees we know we will not ultimately be able to charge. Multi-track processing considerations were raised, as the scenario raised issues about what track the requester is in (see [Section 2.15](#) of the regulations). Fee category issues also came up (see [Section 6.1\(D\)](#) of Handbook). It was also noted that it is important to be clear on scoping issues. The complex interplay between these issues and the underlying facts underlying the question led to the discussion being tabled during the forum to continue outside the forum.

4. *What duplication costs can be charged for scanning a hard copy document?*

Sections [2.8](#), [2.42](#), and [2.44](#) of the regulations can all come into play when direct costs and duplication costs come up. The essential question is are we doing this for our convenience or because the requester asked us to? For example, if the requester said "I want these electronically" and we only have a paper version, we can charge the requester for our costs under 2.42(d) of the regulations. On the other hand, if the requester doesn't specify how they want the records, they just ask for the records, and

we turn a paper version into an electronic version so it is easier for us to process, the requester should not be charged for the costs of making that change.

5. *What exemptions should be used for withholding bank account numbers?*

Consider whether the financial records are those of an individual or a company. If it is an individual, using Exemption 6 may be appropriate. If it is a company, using Exemption 4 may be appropriate. A reminder was given that invoking Exemption 4 requires a submitter notice.

6. *Can records be withheld under Exemption 4 if a submitter doesn't respond to a submitter notice?*

Essentially, Exemption 4 can be asserted only when a submitter affirmatively provides a detailed Exemption 4 objection statement requesting that specific financial information should be withheld. (See our [Exemption 4 Nutshell](#) for further discussion of Exemption 4 issues.) There was a discussion about Indian tribes and if the requirement of responding to submitter notices applied to them as well. (It does.) We noted that tribes do not have a special protected status under the FOIA and briefly discussed the *Klamath* case that addressed this issue in the Exemption 5 context. *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). We also noted that if a voluminous number of submitters are involved, under [Section 2.27\(b\)](#) of the regulations, the bureau may publish a submitter notice in a manner reasonably calculated to reach the attention of the submitters (for example, in newspapers or newsletters, the bureau's Web site, or the *Federal Register*), instead of providing a written notice to each submitter. We discussed that, although people are presumed to read the *Federal Register* each day at breakfast, it is a best practice to also publish written notices on websites and other places submitters are likely to see them.

7. *Are draft documents required to be provided to the FOIA processors if they are responsive to a FOIA request?*

Yes. Draft documents are agency records. Even if they are not federal records under the Federal Records Act, responsive drafts must be provided to the FOIA processor for review.

○ **Announcements/Reminders**

1. The DC Circuit Court of Appeals recently held in *AquAlliance v. Bureau of Reclamation*, 2017 U.S. App. LEXIS 8174 (D.C. Cir. 2017) that Exemption 9 plainly covers water wells along with oil and gas wells. It also found that “the depth and location of wells straightforwardly qualifies as ‘geological and geophysical information.’” This is particularly interesting because it has not always been clear location information about wells was covered by Exemption 9. Congratulations to BOR, SOL, and DOJ.
2. Under the FOIA Improvement Act, when the same records are requested three times or more, they are legally required to be posted in our FOIA libraries. Some requesters are deliberately requesting records three times or more to ensure we post records online that had been removed recently (and have issued press released noting they are doing so).
3. After *Lawyers Ass’n v. EIOR*, 830 F.3d 667 (D.C. Cir. 2016), current Department practice is to review nonresponsive pages in a responsive record along with the

responsive pages (rather than withholding the nonresponsive pages as being nonresponsive). For example, if an email string contains nonresponsive messages within its string, it is still required to be reviewed in its entirety and any portions that are not protected by an Exemption, or for which there would be no foreseeable harm in its release, must be released.

- **Forum adjourned at 2:59 DC local time**



## Department of the Interior Quarterly FOIA Forum (5/18/17)

- **Forum began at 2:01 DC local time**

- **Questions from Attendees and Resulting Discussions:**

1. *When will the next DOJ OIP FOIA training be announced?*

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[Section 2.50](#) of the regulations expressly deals with pre-payment issues. The estimated amount of the fee is not enough, without meeting other factors, to require prepayment. Also, consideration should be given to the timing of making determinations, as taking too long to make a determination can prevent DOI from charging certain fees (see [Section 2.37\(f\)](#) of the regulations). It was noted that if you know you will not be able to make a determination in a timely way, don't ask for an advance payment including fees we know we will not ultimately be able to charge. Multi-track processing considerations were raised, as the scenario raised issues about what track the requester is in (see [Section 2.15](#) of the regulations). Fee category issues also came up (see [Section 6.1\(D\)](#) of Handbook). It was also noted that it is important to be clear on scoping issues. The complex interplay between these issues and the underlying facts underlying the question led to the discussion being tabled during the forum to continue outside the forum.

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Sections [2.8](#), [2.42](#), and [2.44](#) of the regulations can all come into play when direct costs and duplication costs come up. The essential question is are we doing this for our convenience or because the requester asked us to? For example, if the requester said "I want these electronically" and we only have a paper version, we can charge the requester for our costs under 2.42(d) of the regulations. On the other hand, if the requester doesn't specify how they want the records, they just ask for the records, and

we turn a paper version into an electronic version so it is easier for us to process, the requester should not be charged for the costs of making that change.

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Consider whether the financial records are those of an individual or a company. If it is an individual, using Exemption 6 may be appropriate. If it is a company, using Exemption 4 may be appropriate. A reminder was given that invoking Exemption 4 requires a submitter notice.

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7. *Are draft documents required to be provided to the FOIA processors if they are responsive to a FOIA request?*

Yes. Draft documents are agency records. Even if they are not federal records under the Federal Records Act, responsive drafts must be provided to the FOIA processor for review.

○ **Announcements/Reminders**

1. The DC Circuit Court of Appeals recently held in *AquAlliance v. Bureau of Reclamation*, 2017 U.S. App. LEXIS 8174 (D.C. Cir. 2017) that Exemption 9 plainly covers water wells along with oil and gas wells. It also found that “the depth and location of wells straightforwardly qualifies as ‘geological and geophysical information.’” This is particularly interesting because it has not always been clear location information about wells was covered by Exemption 9. Congratulations to BOR, SOL, and DOJ.
2. Under the FOIA Improvement Act, when the same records are requested three times or more, they are legally required to be posted in our FOIA libraries. Some requesters are deliberately requesting records three times or more to ensure we post records online that had been removed recently (and have issued press released noting they are doing so).
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responsive pages (rather than withholding the nonresponsive pages as being nonresponsive). For example, if an email string contains nonresponsive messages within its string, it is still required to be reviewed in its entirety and any portions that are not protected by an Exemption, or for which there would be no foreseeable harm in its release, must be released.

- **Forum adjourned at 2:59 DC local time**

## Department of the Interior Quarterly FOIA Forum (5/18/17)

- **Forum began at 2:01 DC local time**

- **Questions from Attendees and Resulting Discussions:**

1. *When will the next DOJ OIP FOIA training be announced?*

An announcement of DOJ OIP FOIA training is sent out to the DOI FOIA email contact list as soon as the Departmental FOIA Officer is notified of upcoming training dates. It was noted that this training is good and free, but it is usually only in D.C. and they fill up rather quickly. The training dates are also available at: <https://www.justice.gov/oip/training>

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- **Forum adjourned at 2:59 DC local time**



## Conversation Contents

Online FOIA request form update

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Mon May 22 2017 09:33:08 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Online FOIA request form update

Hello, everyone.

The Department's forms system, including the online FOIA request form, has been restored.

Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

# Conversation Contents

Next FOIA forum date and update on the online FOIA request form

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu May 11 2017 08:49:37 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Next FOIA forum date and update on the online FOIA request form

Hello, everyone.

Our next quarterly FOIA open forum will be held on May 16th, from 2 PM to 3 PM (ET).

As you know, the forums are very well attended and use all of our available phone lines (while leaving some people unable to join the call). Therefore, *people in and around the District of Columbia are strongly encouraged to attend in person* in room 5056 of the MIB. People from outside the D.C. area are strongly encouraged to meet in groups to call in together. (This will help us include as many people as possible.)

The dial-in numbers for the meeting are as follows:

Herndon dial-in number: (b) (5)  
Denver dial-in number: (b) (5)

Pin: (b) (5)

Distributing a written summary of the meeting generated a great deal of positive feedback last quarter (thank you!), so we will be doing that this quarter as well.

As for the online FOIA request form, in a nutshell, the Department's forms system is currently broken (and will likely stay broken through the end of the month). Because of this, we've made a notation that the form is temporarily unavailable on the website here: <https://www.doi.gov/foia/requests>

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**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Tue May 16 2017 06:45:50 GMT-0600 (MDT)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>, "Wyant, Robert" <robert.wyant@bsee.gov>

**Subject:** Re: Next FOIA forum date and update on the online FOIA request form

Hello, everyone. A phone-line capacity issue has emerged that will not allow the call to take place today.

The forum is therefore rescheduled to *this Thursday, the 18th*.

All of the other information (including the time and call in numbers) remains unchanged.

Thanks again to BSEE for being such a gracious host and working with us to accommodate this technical challenge.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Thu, May 11, 2017 at 10:49 AM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

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## Next FOIA forum tomorrow

### Attachments:

/112. Next FOIA forum tomorrow/16.1 Quarterly FOIA Forum 2-16-17 (2).docx  
/112. Next FOIA forum tomorrow/16.2 DEPARTMENT OF THE INTERIOR Mail - Re\_  
eERDMS and FOIA.pdf  
/112. Next FOIA forum tomorrow/16.3 DEPARTMENT OF THE INTERIOR Mail - Guidance  
on tracking and assessing search and review fees.pdf

## "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Wed Feb 15 2017 12:03:16 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Next FOIA forum tomorrow

Hello, everyone. Our next quarterly FOIA open forum will be held tomorrow, on February 16th, from 2 PM to 3 PM (ET).

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Thanks again.

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**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Fri Feb 24 2017 12:31:25 GMT-0700 (MST)  
**To:** Robert Howarth <robert\_howarth@ios.doi.gov>  
**BCC:** Cat Sam Cat Contact List <catsamcat\_contact\_list@ios.doi.gov>  
**Subject:** Re: Next FOIA forum tomorrow  
Quarterly FOIA Forum 2-16-17 (2).docx DEPARTMENT OF THE  
INTERIOR Mail - Re\_eERDMS and FOIA.pdf DEPARTMENT OF

**Attachments:**

THE INTERIOR Mail - Guidance on tracking and assessing search  
and review fees.pdf

Thanks again to everyone who attended the forum (and to everyone who tried to attend--we hope to have more phone lines available someday).

As promised, here are our meeting notes.

Have a great weekend.

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## Department of the Interior Quarterly FOIA Forum (2.16.17)

- **Forum began at 2:01 DC local time**

- **Opening Remarks**

There was an announcement to all attending that this forum would have notes taken for the first time that would be subsequently compiled and distributed as minutes.

- **Questions and Answers**

1. *When and why must requests to use eERDMS for FOIA searches go through the Department FOIA Policy Staff?*

Coordination between the OCIO, SOL, and Department FOIA Policy Staff has resulted in specific guidance and background on this point, which was most-recently distributed to the FOIA Contact List on June 3, 2016. (Attached.)

2. *Should documents sent to SOL attorneys be in electronic or hard copy?*

FOIA analysts should attempt to coordinate with SOL attorneys to determine if the documents should be sent in electronic or hard copy format. Communication is key.

3. *What is a reasonable turn around time for SOL reviews?*

A reasonable turn around time will vary depending on the nature of the documents the SOL attorney is reviewing, the size of the package, and the SOL attorney's workload. Again, what is key is for both the SOL attorney and FOIA analyst to communicate.

4. *Why don't SOL attorneys give generic permission to withhold certain kinds of information (for example, "don't bother to send me Exemption 6 redactions, just assume I'll agree")?*

SOL attorneys are not permitted to do this. Their management would not approve and the practice could lead to mistakes or abuse.

5. *How should administrative tasks be accounted for with regards to search and review fees in EFTS?*

Purely administrative tasks (for example, creating and sending an Exemption 4 submitter letter) are not eligible to be included in the search and review fees and are not tracked in the EFTS. Be sure to take advantage of efficiencies, like our [Sample Language](#), to minimize the time spent on administrative tasks.

6. *Where can DOI FOIA guidance be found and is it possible to have a central repository of policy records?*

DOI FOIA guidance and policy documents can be found on the [DOI FOIA Guidance](#) webpage and updates are included in e-mail messages sent out as part of the FOIA Contact list. A good practice a participant mentioned is to maintain the email messages sent out to the FOIA Contact list in a central folder.

7. *Is a submitter letter necessary if a requester offers to waive receiving any Exemption 4 information from the relevant documents?*

Yes. A submitter letter is still necessary, as outlined in DOI regulations [§2.27\(a\)\(2\)](#), if the exceptions in [§2.29](#) are not applicable. More broadly, SOL, the Department's FOIA and Privacy Act Appeals Officer, and the Department's FOIA Policy Staff are all uncomfortable with the idea of requesters being asked to voluntarily exclude from their response materials that are covered by a particular exemption. This type of discussion may lead to mistakes or abuse.

8. *May SOL attorneys suggest exemptions while reviewing documents the analyst plans to release?*

Yes, SOL attorneys are welcome to suggest exemptions while reviewing documents.

9. *Would Exemption 4 or Exemption 5 apply to conference call numbers from vendors?*

The nature of the vendors' relationship with the federal government is determinative. If the vendor gave the federal government the number/passcode as part of a business transaction (we paid them for the exclusive use of the number), Exemption 5's commercial privilege would generally apply. If we have received information from a third party who procured the number/passcode for their own use, Exemption 4 may be appropriate.

10. *At times, SOL attorneys do not respond to notes left in documents asking them questions. What should FOIA analysts do?*

FOIA analysts should bring specific notes they would like the SOL attorney to weigh in on to the attention of the SOL attorney (for example, by color coding or stating where these notes are in a transmission email or coversheet). Don't overuse notes—making a note every time an email address is withheld that it is a business email, for example, would be overkill.



- **Announcements/Reminders**

1. As a general reminder, read material before releasing it, to ensure the release is appropriate. Don't assume material is OK for release, based on labels alone.
2. Please remember that the deliberative process privilege no longer protects records over 25 years old, under the [FOIA Improvement Act of 2016](#), but other Exemption 5 privileges are not time restricted.
3. Please use the correct timing in response letters, consistent with the [FOIA Improvement Act of 2016](#), as has been incorporated in the official [Sample Language](#).
4. Referrals and consultations require that Bureau FOIA Officers coordinate with one another, as required in the [Departmental Manual Chapter](#) on FOIA.
5. There is new guidance on tracking and assessing search and review fees. (Attached.)

- **Forum adjourned at 3:01 DC local time**



Cafaro, Cindy &lt;cindy\_cafaro@ios.doi.gov&gt;

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**Re: eERDMS and FOIA**

1 message

Cafaro, Cindy &lt;cindy\_cafaro@ios.doi.gov&gt;

Fri, Jun 3, 2016 at 11:26 AM

To: Robert Howarth &lt;robert\_howarth@ios.doi.gov&gt;

Cc: John Montel &lt;john\_montel@ios.doi.gov&gt;, "Irish, Tony" &lt;tony.irish@sol.doi.gov&gt;

Bcc: Cat Sam Cat Contact List &lt;catsamcat\_contact\_list@ios.doi.gov&gt;

Hello again. In coordination with the CIO's Office and SOL, we are providing a third limited exception:

eERDMS may be used for FOIA searches when a bureau knows when there is no other way to get the records in question because a previous employee of the Department, who was a political appointee, met their legal obligations by following the February 15, 2013 memorandum on "Managing Federal Records and Documents for Departing Political Appointees."

If you feel one (or more) of the three limited exceptions applies to a particular request, please speak with your Bureau FOIA Officer.

If he or she agrees, the Bureau FOIA Officer will contact my office and we will work with them to confirm the exception applies.

If it does, my office will approve the use of eERDMS for the FOIA search in question. Your bureau FOIA Officer will then work with the CIO's Office (and SOL, if appropriate) to make sure that the eERDMS search is conducted as effectively as possible. That process is located [here](#).

I will update you as soon as it is appropriate to use eERDMS more expansively in response to FOIAs.

Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Thu, May 19, 2016 at 1:59 PM, Cafaro, Cindy <cindy\_cafaro@ios.doi.gov> wrote:

Hello again. We have worked with the CIO's Office and SOL to provide a second limited exception: eERDMS may be used for FOIA searches when a bureau knows that legacy emails (created before the switch to BisonConnect on January 23, 2013) are present in eERDMS, but is unable to reach the legacy emails through BisonConnect, its own servers, or its own paper files because, during the migration of information into BisonConnect, the bureau did not maintain electronic copies of the legacy emails and did not print and file the legacy emails.

If you feel one (or both) of the two limited exceptions applies to a particular request, please speak with your Bureau FOIA Officer.

If he or she agrees, the Bureau FOIA Officer will contact my office and we will work with them to confirm the exception applies.

If it does, my office will approve the use of eERDMS for the FOIA search in question. Your bureau FOIA Officer will then work with the CIO's Office (and SOL, if appropriate) to make sure that the eERDMS search is conducted as effectively as possible.

I will update you as soon as it is appropriate to use eERDMS more expansively.

Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

On Tue, Feb 10, 2015 at 12:24 PM, Cafaro, Cindy <[cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov)> wrote:

Hello, everyone. You may have heard that the Department, as part of its IT Transformation, has implemented an "eMail Enterprise Records and Document Management System (eERDMS)." The impact eERDMS will have on FOIA searches has been discussed many times at our monthly Bureau FOIA Officers meetings over the last few years.

Many technical, legal, policy, and staffing issues will need to be addressed before the Department's FOIA community will be able to regularly utilize eERDMS. Conversations between my office, the CIO's Office, and SOL are ongoing. At this time, the most important thing for you to know is that, with one very limited exception eERDMS should not be used for FOIA searches at this time.

The exception is when there is no other way to get the records in question because a previous employee of the Department's records were not properly filed and preserved upon their departure. If you feel this exception applies to a particular request, please speak with your Bureau FOIA Officer. If they agree, they will need to contact my office and we will work with them to consider the request. If appropriate, we will work with the CIO's Office and SOL to make sure that the eERDMS search is conducted as effectively as possible.

I will update you as soon as it is appropriate to use eERDMS more expansively.

Thank you.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181



Cafaro, Cindy &lt;cindy\_cafaro@ios.doi.gov&gt;

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## Guidance on tracking and assessing search and review fees

1 message

Cafaro, Cindy &lt;cindy\_cafaro@ios.doi.gov&gt;

Wed, Feb 15, 2017 at 1:37 PM

To: Robert Howarth &lt;robert\_howarth@ios.doi.gov&gt;

Bcc: Cat Sam Cat Contact List &lt;catsamcat\_contact\_list@ios.doi.gov&gt;, "Nguyen, Diem" &lt;diem\_d\_nguyen@ios.doi.gov&gt;

Hello, everyone. Questions have arisen about tracking and assessing search and review fees. Carefully keeping track of your search and review time ensures you do not over- (or under-) estimate the time spent searching and reviewing for a particular request. It may also assist you later if the requester appeals or sues.

Sections 2.41 and 2.43 of our FOIA regulations (located [here](#)--please take a look to make sure you have the newest version, as our recent amendments to the regulations went into effect last month--an item-by-item list of the changes is available [here](#)) specifically address the search and review fees a requester is required to pay. The regulations note these fees are charged by the quarter hour.

If you are doing a FOIA search or review, keep careful track of how long you have searched and/or reviewed. Do not round your time up or down when you report it to the office that will be making the final decision on the request and responding to the requester (the Action Office).

This is a good way to keep track of your time (please note that the entries are precise and broken out by day):

Request 2017-00001

- 4/11/17--17 minute search and 25 minute review
- 4/12/17--20 minute search and 31 minute review

This is not as good (please note the entry has total amounts, rather than being broken out by day):

- Request 2017-00001--37 minutes searching and 56 minutes reviewing

You will report your time spent searching/reviewing to the Action Office. The Action Office will add up the time all of the searchers/reviewers have spent on the request. The Action Office will then charge search and/or review time (when appropriate) for any full 15-minute increments (and enter that time in the EFTS).

For example, if three [Professional](#) people searched and one searched 16 minutes, a second searched 31 minutes, and a third searched 10 minutes, that adds up to 57 total minutes searched. The Action Office will charge for (and put in the EFTS) the three complete 15-minute increments, for a total of 45 minutes of Professional search time. The Action Office should not charge for the additional 12 minutes that make up a partial 15-minute increment (or enter that extra time in the EFTS).

Thank you for your attention to this matter. Fee issues can be complex. If you have any questions, please feel free to let me know.

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181